SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 422

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian *ad Litem*,

Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2–3
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	11
Primary Argument: Johnson v. *Muelberger*, 340 U. S. 581, is inapplicable to the situation presented below of a migratory divorce collusively procured by fraud on the court of a sister state; the decision below conflicts with *Cook* v. *Cook*, 342 U. S. 126, and other cases applying full faith and credit	11–14
1. The conditions requisite for giving full faith to a sister state divorce record, as specified in *Cook*, were not complied with by the court below	14–20
2. Refusal of the court below to declare petitioner's status as a legitimate citizen of the State of New York is arbitrary and discriminatory action in violation of Article IV, Sections 1 and 2, and of the XIVth Amendment to the United States Constitution	20–26
Conclusion	26

PAGE

CITATIONS:

Brown v. Board of Education, 347 U. S. 483 23

Buehler v. Rensselaer Co., 260 N. Y. 268, 183 N. E. 384 9

Caldwell v. Caldwell, 298 N. Y. 146, 81 N. E. 2d 60 ... 24

Christopher v. Christopher, 198 Ga. 361 (2a), 31 S. E. 2d 818 19

Coe v. Coe, 334 U. S. 378 15

Cole v. Cole, 221 Ga. 171, 143 S. E. 2d 637 ..... 8, 18, 23

Cook v. Cook, 342 U. S. 126 ..... 11, 14

DeBouchel v. Candler, 296 F. 482 19

Dicks v. Dicks, 177 Ga. 379 ..... 7, 22

Durden v. Durden, 184 Ga. 421, 191 S. E. 455 19

Estin v. Estin, 334 U. S. 541 ..... 14, 17, 25

Griffin v. Griffin, 327 U. S. 220 16

In re Gault, U. S. Law Week, Vol. 35, 4399 25

In re Lindgren, 293 N. Y. 18, 55 N. E. 2d 849 8

Johnson v. Muelberger, 340 U. S. 581 ..... Passim

Kerr v. Kerr, 41 N. Y. 272 ..... 12, 21

Magowan v. Magowan, 19 N. Y. 2d 296 revg. 24 A. D. 2d 840 23

May v. Anderson, 345 U. S. 528 ..... 14, 16

Mills v. Duryee, 7 Cranch 481 9

PAGE

Parker v. Hoefer, 2 N. Y. 2d 612, 162 N. Y. S. 2d 13 13

Phillips v. Phillips, 15 Misc. 2d 884, 180 N. Y. S. 2d 475 5

Queen v. Gyngall, 2 Q. B. Div. 232 26

Rosenstiel v. Rosenstiel, 16 N. Y. 2d 64, 209 N. E. 2d 709 ..... 22, 23

Sherrer v. Sherrer, 334 U. S. 343 ..... 11, 14, 16

Simons v. Miami First National Bank, 381 U. S. 81 ..... 6, 17, 21

Tippin v. Tippin, 148 Conn. 1 5

Urquhart v. Urquhart, 185 Misc. 915, 57 N. Y. S. 2d 734, affd. 270 App. Div. 759, 59 N. Y. S. 2d 921, 188 Misc. 613, 66 N. Y. S. 2d 472, affd. 272 App. Div. 60, 69 N. Y. S. 2d 57, affd. 297 N. Y. 689, 77 N. E. 2d 1; 196 Misc. 664, 92 N. Y. S. 2d 484 affd. 277 App. Div. 752, 97 N. Y. S. 2d 200 ..... Passim

Vanderbilt v. Vanderbilt, 354 U. S. 416 affg. 1 N. Y. 2d 342 ..... 5, 8, 14, 17

Williams v. North Carolina II, 325 U. S. 226 14

STATUTES:

Constitution of the United States:

Art. IV, Section 1 ..... Passim

Art. IV, Section 2 ..... Passim

14th Amendment, Section 1 ..... Passim

PAGE

28 U. S. C. 1257 (3) 2

28 U. S. C. 2101 2

28 U. S. C. Sec. 1738 ..... 3, 11, 16

3211(a) subd. 1 and 7, N. Y. CPLR 3, 4

Section 5-311, Gen'l Obligations Law (N. Y.) .. 7, 24

Section 110-701, Code of Ga. 1933, as amended .. 3

Section 110-706, Code of Ga. 1933, as amended .. 3, 8

Section 110-709, Code of Ga. 1933, as amended .. 3, 19

Section 30-107, Code of Ga. 1933, as amended .. 3, 4, 7

Section 250, N. Y. Dom. Rel. Law 24

MISCELLANEOUS:

Note, David P. Currie, Suitcase Divorce in the Conflict of Laws (U. Chi. L. Rev. Vol. 34, 1966, pp. 26, 43, 62) 21, 25

Ehrenzweig, Conflict of Laws, 1962, 252-254 ..... 6, 18

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled action on February 28th, 1967.

Opinions Below

The order and *per curiam* opinion of the Appellate Division are printed as Appendices A and B hereto. The *per curiam* opinion is reported in 25 A. D. 2d 515 and 266 N. Y. S. 2d 1021. The Court of Appeals rendered no opinion. The opinion of the Supreme Court, New York County, at Special Term, was not reported and appears in the Record, pages 7-8. The amended remittitur of the Court of Appeals is printed as Appendix C.

Jurisdiction

The judgment of affirmance by the Court of Appeals, sought to be reviewed, was entered on February 28, 1967.

Jurisdiction of the Court is invoked under 28 U. S. C. 1257(3) and 2101. On May 15, 1967 Mr. Justice Harlan extended the time for filing the petition for certiorari to July 28, 1967.

Questions Presented

1. Whether the full faith and credit clause, as expounded in *Johnson* v. *Muelberger* (340 U. S. 581), precludes the infant petitioner from attacking (*as to him*) the void foreign decree of his parents, collusively and fraudulently procured by them in a sister state (Georgia) before the birth of petitioner in New York State, he being a potential ward of New York, where the parents are and were domiciled at all times after marriage.

2. Whether dismissal of petitioner's cause as on demurrer and before trial violated the due process or equal protection clause of the Fourteenth Amendment by precluding him from attack in such circumstances as give him standing to assail the void divorce decree under the settled law of the forum, New York State.

3. Whether recognition by the New York courts of a consensual divorce, decreed by the Superior Court of Georgia and admittedly procured by the parties' collusion and fraud perpetrated on that court, is in violation of the full faith and credit and privileges and immunities provisions of Article IV, Sections 1 and 2, as well as of the Fourteenth Amendment.

4. Whether the courts below contravened Article IV of the U. S. Constitution, either as to Section 1 or Section 2, and extended more faith and credit in New York to the Georgia divorce record and decree than would be accorded by the State of Georgia.

Statutes Involved

This petition involves Article IV, Sections 1 and 2 of the United States Constitution, and the due process and equal protection of laws provisions of the Fourteenth Amendment thereto and 28 U. S. C. Section 1738, 62 Stat. 947.

State statutes involved are N. Y. Civil Practice Law & Rules 3211(a), subd. 1 and 7, and General Obligations Law, 5-311 and Sections 110-701, 110-706, 110-709 and 30-107 of the Code of Georgia, 1933, as amended. All statutes are printed in pertinent part as Appendix D.

Statement of the Case

Petitioner sues by guardian *ad litem* for declaratory relief, alleging that a colorable decree of total divorce was collusively procured in May, 1952 by defendants, his parents, in the Superior Court of the State of Georgia; that respondent Stuart M. Goldsmith and his co-defendant, Florence D. Goldsmith, had married in 1947 in New York City, lived together there until April 1952, when the latter went to the State of Georgia, spent several hours there and returned to her home in New York the same day; that after such return, despite the purported divorce, the parties resumed marital relations and on March 6th, 1954, petitioner was born in New York in consequence of that relationship (R. 10-12).

The complaint further states that such foreign decree was void in that a fraud was perpetrated on the divorce court with respect to the requirement of six months actual residence in Georgia before commencement of the action there; that the judgment rendered is subject to impeachment as a nullity under the law of that state, the Superior Court lacking jurisdiction over the subject matter and the parties, both of whom were then and still are domiciliaries of the State of New York (R. 12-14).

Petitioner seeks adjudication declaring that the foreign decree is void *as to him* and that he is the lawfully born child of defendants (R. 14-15).

Before answer respondent moved for accelerated judgment at Special Term and to dismiss the action pursuant to CPLR 3211(a) subd. 1 and 7. The grounds of the motion were that a defense existed founded upon documentary evidence and that the cause of action was insufficient as a matter of law (R. 19-20).

The Supreme Court, Special Term, denied the motion, holding that a pleading challenged for insufficiency should be construed liberally and allegations of fact taken as true. It ruled that the documentary evidence submitted, consisting of the Georgia court record neither related to nor could disprove petitioner's paternity by respondent happening almost two years after the latter's divorce case closed (R. 6-8).

In his opinion Mr. Justice Helman also overruled respondent's contention that declaratory judgment was not the proper relief:

> "Declaratory actions have been frequently used to clarify family relationships and to determine legitimacy" (R. 7).

Respondent appealed to the Appellate Division, First Department, which reversed on the law the order appealed from, granted the motion and directed entry of judgment of dismissal, with costs in both courts.

The Appellate Division opinion relies solely on *Johnson* v. *Muelberger* (340 U. S. 581), and largely on *Phillips* v. *Phillips,* 15 Misc. 2d 884, in concluding that full faith and credit and the law of collateral attack in Georgia precluded attack in New York by petitioner. *Muelberger* dealt with collateral attack by a daughter of a deceased parent, which involved Florida law, the rendering state. Significantly, the Supreme Court of the United States in *Muelberger* pointed out as to the *standing* of the daughter to launch an attack in the Surrogate's Court of New York, that she possessed a "mere expectancy" of inheritance at the time of entry of her father's divorce decree (340 U. S. at 588). The Court in commenting on the expectancy of the daughter's inheritance considered applicable the estate law of New York, not that of Florida, where the divorce was obtained.

The *Phillips* case, decided in the Supreme Court of New York, New York County, construed the Georgia law of collateral attack against a second husband who sought to avoid further support of his wife.

The question of the standing of a person to make collateral attack is entirely distinct from, and not to be confused with, the secondary issue confronting him, viz., the merits of the grounds for attack and the proof thereof (*Tippin* v. *Tippin,* 148 Conn. 1, 6). Both the Appellate Division and the N. Y. Supreme Court in *Phillips* failed to distinguish between these two essentially distinct issues.

This distinction, however, was observed in *Vanderbilt* (354 U. S. 416), holding that the wife's domicil, the forum

state of New York, could award her support after an *ex parte* foreign divorce obtained by Mr. Vanderbilt. Mr. Justice Harlan, concurring in *Simons* v. *Miami First National Bank* (381 U. S. 81 at 87 n.), referred to the application of the law of the forum as follows:

> "If Mr. Vanderbilt owned property in New York at the time of the *ex parte* divorce, New York might arguably be free to hold that ownership of New York property carries with it the obligation to support one's wife, at least to the extent of the value of that property."

Moreover, the reasoning of the Appellate Division avoids any and all consideration of the traditional theory of *in rem* jurisdiction to grant divorce. Except for participating parties and those in privity with them * * *

> "the very essence of in rem jurisdiction * * * is the actual situs of the res within the court's jurisdiction, and this is lacking in the absence of *bona fide* domicile." (Ehrenzweig, Conflict of Laws, 252; 1962)

Here the domicil of both parties to the Georgia divorce is New York, the matrimonial domicil, and never in Georgia (R. 10-12). The party-plaintiff sojourned at Augusta several hours on April 24th, 1952, and returned by train to New York the same day. She did not even register at a hotel in Augusta, saw the lawyer there, signed some papers and used the round trip railroad ticket given her by her husband's New York counsel (R. 107, 108, 40-41). At most the proceedings amounted to "the form of divorce gone through". The purported decree of divorce merely found that the court possessed personal jurisdiction over the parties (R. 51).

That Georgia does not permit divorce by consent was also overlooked below:

> "One filing a petition for divorce must allege and prove that he has been a *bona fide* resident of the State for the length of time required by law. The burden of proof is upon the applicant. *Jurisdiction of the subject matter cannot be conferred by consent.*" (Emphasis ours). (*Dicks* v. *Dicks*, 177 Ga. 379, 382).

Furthermore, neither petitioner nor either parent has the slightest contact with the foreign rendering state. His standing to attack the invalid decree is determinable by the law of the forum as in *Simons, May, Estin, Vanderbilt* and *Muelberger.*

The Appellate Division adverted to none of the constitutional objections raised by petitioner under the due process or equal protection of laws clauses of the Fourteenth Amendment. These federal questions were raised before the Appellate Division and in the opposing affidavit of petitioner's guardian submitted in the court of first instance (R. 135-136).

The Appellate Division placed its *imprimatur* on consensual divorce in the sister state of Georgia, saying that "there is no requirement under Georgia law that the (divorce) petitioner's residence be pleaded or established in any particular form". The *dictum* conflicts not only with the public policy of Georgia, as pronounced by its Supreme Court in *Dicks* (177 Ga. 379) and other cases, but with the long established public policy of New York. In New York spouses are prohibited from contracting *inter sese* to dissolve their marriage (N. Y. Gen. Obligations Law §5-311). Extending such misconstruction of Georgia law into New York and against a citizen thereof constitutes

discrimination against petitioner's rights under the United States Constitution, Art. IV, Section 2. Petitioner is entitled to the same, not less, protection than New York's own public policy against consensual divorce affords him. See *Vanderbilt* v. *Vanderbilt* (1 N. Y. 2d 342, 352; 153 N. Y. S. 2d 1, 9).

Innocent interested third parties are permitted to attack collaterally void foreign divorces, *in rem* jurisdiction lacking, under both the law of New York and Georgia.

In re Lindgren's Estate, 293 N. Y. 18, 55 N. E. 2d 849 (1944);
Urquhart v. *Urquhart,* 272 App. Div. 60, aff'd 297 N. Y. 689, 77 N. E. 2d 1 (1947);
Cole v. *Cole,* 221 Ga. 171, 143 S. E. 2d 637 (1965).

In the *Cole* case the foreign divorce record showed that plaintiff's first husband had alleged residence requisite for divorce and his wife had appeared and admitted it. The fact that personal jurisdiction existed over both parties to the prior divorce suit was immaterial; absent subject matter jurisdiction. On the other hand, in the case at bar no evidence of domicil in Georgia was even offered; the jurisdictional issue was not pleaded, admitted, offered in evidence or found (R. 37-39; 43-44, 47-48, 51).

Possible *vacatur* of the decree by reason of perjury (Ga. Code, Section 110-706) was avoided by the artifice of the parties (Mr. and Mrs. Goldsmith) not swearing to or admitting under oath to any residence of the wife in Georgia. Instead the unsworn introduction or preamble to the divorce petition "set out" that Mrs. Goldsmith as plaintiff was "a resident of Richmond County, Georgia, for more than six months" (R. 37-38). Her deposition

of five answers to five questions was devoid of reference to her residence anywhere (R. 47-48).

Petitioner's appeal to the Court of Appeals resulted in affirmance without costs in that court. No opinion was rendered by the Court of Appeals. Therefore, the views of the Court below were not necessarily adopted or approved (*Buehler* v. *Rensselaer County*, 260 N. Y. 268, 183 N. E. 384).

In addition to the objection to the violation of petitioner's rights under the due process and equal protection of laws clauses of the XIV Amendment, petitioner in the Court of Appeals contended that the reversal and dismissal by the Appellate Division violated the full faith and privileges and immunity clauses of the United States Constitution, Art. IV, Sections 1 and 2. On the proposition that this Article prohibits a state court giving greater effect in the forum than is accorded by the rendering sister state, cases from *Mills* v. *Duryee*, 7 *Cranch* 481 (1813) to *Simons* (1965) were cited.

Attention is called to the fraud on the Georgia Superior Court. No sworn allegation of Mrs. Goldsmith's residence in or out of the State of Georgia was set forth in her petition for divorce. Instead the introductory sentence, or preamble, to the petition for divorce described her as "a resident of Richmond County, Georgia, for more than six months prior to the filing of this petition" (R. 37). Following were five numbered paragraphs and she swore only to the truth and correctness of the "consecutively numbered" allegations (R. 38). Respondent's purported answer, appearing in his own person, neither admits nor denies the unsworn assertion of Mrs. Goldsmith's residence (R. 43). The only evidence in the case, submitted in the form of a post-dated deposition, contains no refer-

ence to the divorcing plaintiff's residence. The entire deposition reads:

> "Q. What is your name? A. My name is Florence A. Goldsmith.
>
> Q. Are the allegations set forth in your petition, consecutively numbered, true and correct? A. Yes.
>
> Q. When were you and the defendant married and upon what date did you separate? A. We were married on February 15, 1947 and separated on or about April 16, 1952.
>
> Q. What was the cause of said separation? A. The cause of said separation was mental cruel treatment, wilfully inflicted upon me by my husband, which consisted of fussing and nagging on his part.
>
> Q. Are you asking for a total divorce? A. Yes (R. 47-48)."

The foregoing was purportedly sworn to in Georgia on May 1st, 1952, at which time Mrs. Goldsmith was back in New York. She spent several hours only on April 24th, 1952 in Augusta, Georgia (R. 107-108). There she went to the office of her attorney, retained for her by Mr. Goldsmith's New York attorney, and signed some papers (R. 108).

Another piece of deception was the use of the legal back for enclosure of Mr. Goldsmith's answer subscribed in his own person (R. 43-45). Below no explanation of the effect under Georgia law of the dual form of appearance, if it be that, was advanced. Undoubtedly its purpose was to mislead the Superior Court into the belief that both parties to the case were represented by local counsel. But no evidence thereof was adduced. Whether or not Mr. Mixon was authorized to appear for respondent is nowhere revealed. Finally, on this point the decree of divorce

omits any reference to the required jurisdictional residence of six months (R. 51).

As stated at page 16 hereof the Georgia divorce court record is not exemplified and is otherwise defective, not having been certified in accordance with Title 28, Section 1738, U. S. Code. The defective, meaningless form of certification, appended to the papers, is that

> "the above is a true copy from the minutes of said court."

Reasons for Granting the Writ

Petitioner's primary argument is that the court below erred in relying upon *Johnson* v. *Muelberger*, 340 U. S. 581 rvg. 301 N. Y. 13 (1951) *sub nom In re Johnson's Estate.* The more pertinent question, evidently not yet reached by this Court, is whether respondent is in a position to claim collateral protection and full faith and credit for the Georgia decree of divorce, collusively procured by him by the deceit perpetrated on the foreign divorce court as to the domicil of one party thereto (14 L. Ed. 2d 922, n. 18).

In *Cook* v. *Cook*, 342 U. S. 126, 129 (1951) Mr. Justice Douglas spoke for this Court:

> "We also reserve the question * * * whether respondent [second husband] would now be in a position to attack the Florida decree collaterally if it were found to be collusive and he participated in the fraud."

It was established in migratory divorce many years before *Sherrer* v. *Sherrer*, 334 U. S. 343 (1945), that inquiry into subject matter jurisdiction was not foreclosed by the full faith and credit clause of the United States

Constitution. Such judgments, procured by fraud on the court, were impeachable collaterally by parol evidence.

Kerr v. *Kerr*, 41 N. Y. 272 (1869).

Sherrer holds that full faith on grounds of *res judicata* must be accorded the sister state decree when challenged later in the home state by a *spouse* who had appeared or was subject to personal jurisdiction (334 U. S. 343). One salutary effect was to preserve the validity of either party's subsequent remarriage. Here, of course, that problem does not arise, neither of petitioner's parents having legally remarried anyone. The decision is a sensible application of full faith where the doctrine of *res judicata* is operative.

In the *Kerr* case the contest was between two women over the right to administer the claimed deceased husband's estate. Decedent had procured a divorce in Indiana from one of them, but the proof showed that he, a New Yorker, had not maintained the requisite one year's *bona fide* residence in Indiana. Similar to respondent's pretended and fraudulent appearance in the case at bar, the wife's appearance and answer by local attorneys in the divorce suit was unauthorized.

Holding that the full faith and credit clause did not preclude inquiry into the exercise of jurisdiction over the subject matter or the parties by the rendering state court, nor inquiry into whether "the judgment was founded upon or impeachable for fraud", the court's opinion *per* James, J. said:

> "It was insisted that a foreign judgment could not be inquired into collaterally, or impeached by parol evidence. But the judgment of a court of a sister State has no binding effect in this State unless

> the court had jurisdiction of the subject matter and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment when * * * any benefit is claimed for it; the want of jurisdiction, either of the subject matter or of the person of either party renders a judgment a mere nullity" (41 N. Y. at 275).

The concurrent opinion of Grover, J. in the same case stated:

> "Although it appeared from the (divorce) record that attorneys appeared for the respondent in the suit, yet it was proved by the respondent that she never authorized them to appear and had no knowledge thereof. That such appearance was not only a fraud upon the respondent, but also upon the court in Indiana, and the laws of that State."

The rule was recently reiterated by the N. Y. Court of Appeals in *Parker* v. *Hoefer*, 2 N. Y. 2d 612, 162 N. Y. S. 2d 13 (1957):

> "a judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata in the absence of fraud or collusion* * * *." (Emphasis supplied.) (2 N. Y. 2d at 616.)

Plaintiff Parker sought to enforce in New York a final judgment obtained in Vermont against a New York resident. The action was based upon defendant's alienation of plaintiff's husband, a cause of action abolished in New York as against public policy. In applying full faith to the foreign judgment, the majority held that defendant could not reopen the litigation and relitigate a cause of action barred by New York public policy. Thus, the

Vermont judgment sued upon was enforcible for the act relied upon did not purport to abolish actions on judgments of alienation of affection, rendered outside New York. As stated above, a notable exception to judgments entitled to full faith are those procured by fraud on the court.

The infant petitioner contended below, under such governing decisions as *Estin* v. *Estin,* 334 U. S. 541 (1948), *Williams* II (1942), *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948), *May* v. *Anderson,* 345 U. S. 528 (1953) and *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416 (1957) that the full faith and credit clause was inapplicable, the jurisdictional defect of the divorce court showing on the face of the court record, as well as from the void decree fraudulently and collusively procured by his parents. Further, that to bar him before trial from establishing his legitimacy violated the due process and equal protection of laws provisions of the XIVth Amendment to the United States Constitution.

1. *The conditions requisite for giving full faith to a sister state divorce record, as specified by this court in Cook* v. *Cook, 342 U. S. 126, were not complied with by the court below.*

In *Cook* this Court laid down the precise situations where collateral attack is precluded in migratory divorce. There a second husband upset in Vermont the Florida divorce decree, obtained by the wife from her first spouse, through deceiving the Florida divorce court as to her domicil. He actively aided and abetted her in the scheme to defraud the court.

The three situations are:

> "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer* v. *Sherrer,* 334 U. S. 343)

> or appeared and admitted her Florida domicile (*Coe* v. *Coe*, 334 U. S. 378)
>
> or was personally served in the divorce state (*Johnson* v. *Muelberger*, 340 U. S. 581, 587) he would be barred from attacking the decree collaterally, • • • "

Here the defendant spouse did not contest the issue of Mrs. Goldsmith's domicile, did not admit it, nor was he personally served in Georgia. Thus, the conditions for preclusion prescribed by *Cook* do not exist.

More than the "form of divorce gone through", inveighed against by Mr. Justice Frankfurter, the deception of the Georgia Superior Court consisted of two things: (1) The designed omission of any allegation or any evidence of the divorcing applicant's residence for six months, resulting in no finding in the purported decree, or elsewhere, of that jurisdictional issue, and (2) the assumed appearance *pro se* of the defendant husband was placed under the printed legal back of a Georgia attorney without formal substitution or notice of appearance or authority to represent the absent spouse. By the latter device the Superior Court was doubtless led to believe the proceedings were not "consensual" (R. 37, 38 (petition); 41-42 (appearance); 43-44 (answer); 45 (Mixon legal back); 47-48 (deposition); 51 decree of divorce).

In *Muelberger* domicile was put in issue but not contested on the trial. In *Sherrer* domicile was denied and admitted in *Coe*. While collusion may have occurred between the parties in both cases, no such claim of palpable fraud on the court was mads as is advanced here. Neither Mr. nor Mrs. Goldsmith ever attended any "hearing" at Augusta, Georgia. Moreover, *Cook* was remanded and a

presumption of validity of the Florida decree indulged in the total absence of any divorce court record in evidence.

It is already noted that the Georgia Superior Court record, supplied by respondent is defective, not exemplified or certified in accordance with U. S. Code, Title 28, Section 1738 (62 Stat. Section 947) (R. 52). In this patently feigned divorce action the record shows no pleading, evidence, admission, finding or judgment on the domicile of Mrs. Goldsmith. Unlike *Muelberger, Sherrer* and *Coe* no opportunity was given to either party to show true domicile. If respondent's purported *pro se* appearance dropped out because of Attorney Mixon's form of appearance, filed presumably on behalf of respondent, the assumption of the Appellate Division of "voluntary submission" by the parties to the divorcing court is unwarranted.

By dismissal before trial and without affording petitioner any chance to prove paternity, an issue denied *in extenso* by respondent's affidavits, procedural due process was withheld.

> *May* v. *Anderson,* 345 U. S. 528 (1953);
> *Griffin* v. *Griffin,* 327 U. S. 220, 229 (1946);
> *Urquhart* v. *Urquhart,* 196 Misc. 664, affd. 277 App. Div. 752 (1949).

After trial in *Urquhart* the New York Supreme Court (Hofstadter, J.) passed upon the procedural question of proof of paternity. Plaintiff was in the identical situation of petitioner, viz., born after a void foreign divorce procured by fraud on the court, both parties being domiciliaries of New York:

> "He (infant plaintiff) asserts not alone that John is his father but that the Arkansas divorce is void for want of jurisdiction * * * and that, *as to him, at*

least, John and Vivien are still husband and wife and that he is, consequently, their lawful son.

We thus face at the threshold the question whether John is, in fact, the plaintiff's father. For, were it found that he is not, there would be no occasion to pass on the validity of the divorce.'' (Italics ours) (92 N. Y. S. 2d 484, 489).

Noteworthy, too, is the ruling in *Urquhart,* affirmed by the Appellate Division, that defendant's special appearance, protesting service by publication on him in Maryland, did not constitute "voluntary submission" to the New York courts. Such personal jurisdiction did not curtail jurisdiction over the *res,* viz., plaintiff's relationship or *status* as between him and both parents in New York (92 N. Y. S. 2d at 488). Here we are concerned with the reverse situation where jurisdiction *in rem* was wholly absent and an unfounded recital of personal jurisdiction only set forth in the foreign court record. That such a connived "appearance" should constitute "voluntary submission" is unthinkable.

In any case the purely personal right of *status* is involved in the case at bar, as in *Urquhart.* That case, declaring plaintiff to be the legitimate son of defendants, did not disturb the subsequent remarriage of the plaintiff's father. For that reason it may be considered a precursor to the divisible divorce concept first pronounced in *Estin* v. *Estin,* 334 U. S. 541 (1949).

Estin, Vanderbilt and *Simons* v. *Miami Beach First National Bank,* 381 U. S. 81 (1965) deal with alimony and dower or estate interests, as does *Muelberger.* The question in each was whether property rights, vested or future, were cut off by divorce decrees rendered in actions in which the claimants did not participate. But no property rights

as such were involved in *May* or in the case at bar. In the instant case in Georgia, total or absolute divorce was decreed without any request or award of alimony, support or custody. Likewise, in *May* the wife's personal right in Ohio to custody of children was deemed a right not within the force of an *ex parte* decree of Wisconsin. No mandate of full faith was imposed.

Urquhart also involved an infant's *status* as distinct from claims to property. It has been said that considerations of this Court in *Muelberger* on the advancement of the daughter's financial claims, viz.; sharing in her father's estate "hardly apply when the establishment of the invalidity of a foreign divorce would ensure the legitimacy of a child".

Ehrenzweig, Conflict of Laws, 253, 254 (1962).

As a matter of fact, since petitioner asks that the Georgia decree be declared void only as between himself and his parents, but not as between themselves, the situation is no different, under full faith requirements, than that of *Estin.*

Full faith and credit is not accorded by the courts in Georgia to a sister state decree of divorce where evidence *dehors* the divorce case record shows that such foreign decree is a nullity for want of jurisdiction. The void judgment, even though no jurisdictional defect appears on its face, may be collaterally attacked in any court by a third person who is materially and adversely affected by such decree.

Cole v. *Cole*, 221 Ga. 171, 143 S. E. 2d 637 (decided July 12, 1965).

Mrs. Cole sued for total divorce in Georgia. Defendant, her second husband, filed no defensive pleadings. She

had been divorced by her first husband in Alabama on a petition filed by him. At an interlocutory hearing for temporary alimony and counsel fees in the Georgia divorce case an exemplified copy of the Alabama decree was received in evidence. That record showed that her first husband had alleged that both he and his wife resided in Alabama at commencement of suit. Mrs. Cole responded thereto and admitted the jurisdictional allegations.

But, on the interlocutory hearing, Mrs. Cole testified that neither she nor her former husband had ever lived in Alabama, that he was alive and resided in Port Chester, New York and that no other divorce was granted to her or the first husband. On this extrinsic evidence the suit was dismissed on motion of the second husband.

In affirming dismissal the Supreme Court of Georgia, per Chandler, P. J., said as to the full faith and credit requirement:

> "but where as here the evidence of one relying upon a foreign decree conclusively shows that such decree is a nullity, the courts of this State are not required to give it full faith and credit and a person not a party to such divorce proceeding whose rights are materially and adversely affected by it may collaterally attack its validity in the courts of this State. *Durden* v. *Durden,* 184 Ga. 421 (191 S. E. 455); *Christopher* v. *Christopher,* 198 Ga. 361 (2a) (31 S. E. 2d 818); *De Bouchel* v. *Candler,* 296 F. 482.
>
> "Here the positive evidence of Mrs. Cole shows that a fraud was practiced by her and her former husband on the Alabama Court which purportedly divorced them; * * * ".

Cole, it is submitted, flatly applies Section 110-709 of the Georgia Code permitting collateral attack on the void judg-

ment of a court having no jurisdiction over the subject matter by a non-party thereto, who is materially and adversely affected, as is petitioner. The fact that personal jurisdiction was obtained over the wife and first husband in the divorce action is not material, absent subject matter jurisdiction.

2. *Refusal of the court below to declare petitioner's status as a legitimate citizen of the State of New York is arbitrary and discriminatory action in violation of Article IV, Sections 1 and 2, and of the XIVth Amendment to the United States Constitution.*

Laying to one side the challenges to validity of foreign divorce, such as in *Sherrer* and *Coe,* which were between disgruntled spouses, the attack reaching this Court in *Muelberger* was launched by a "stranger" to the decree. Petitioner perforce, not being *in esse* at the time of divorce, was no party thereto.

But petitioner's *standing* to attack his parents' fraudulent divorce is no different from that of the "*wives*" in *Vanderbilt, Simons* and *May,* none of whom had established a claim to property interests at the time of divorce. In *May* v. *Anderson* the Court extended *Estin* to child custody; Ohio was not required to give constitutional respect to a Wisconsin *ex parte* award of custody to the father, saying:

> "a mother's right to custody * * * is a personal right entitled to at least as much protection as her right to alimony" (345 U. S. 528, 534).

Similarly, in *Vanderbilt* full faith was not obligatory, so as to preclude Mrs. Vanderbilt from support in New York, even though her statutory right to support had not been reduced to judgment before her husband got his *ex parte* Nevada divorce.

The impact of *Simons* v. *Miami Beach First National Bank* (381 U. S. 81), decided in 1965, is exhaustively discussed and disapproved of by Professor David P. Currie in Suitcase Divorce in the Conflict of Laws (U. Chi. L. R., Vol. 34, No. 1, 1966, p. 26). A distinguishing feature, from the case at bar, was that Mrs. Simons attempted to secure dower rights in and under the law of the divorcing state, Florida:

> "The Court certainly did not say that New York would have been powerless to grant the widow a statutory share, had it chosen to do so * * *" (Currie, *supra*, p. 43).

On the other hand petitioner seeks declaratory relief in his home (forum) state, not in the divorcing state of Georgia with which neither he nor his parents ever had more than ephemeral contacts.

The reason or sense in applying mechanically the rule of *Muelberger* in this case does not appear. The court below said that the divorcing parent-parties are foreclosed from collateral attack, which is clearly right. But to apply the same rule to petitioner, seeking no property benefit from a declaration of his status, nor attempting to upset the marital *status* of the parties, is wrong. Not being in privity of estate, as was the daughter in *Muelberger*, in no true sense does he "claim through" the parties to the fraudulent divorce. And as stated in *Kerr* v. *Kerr* (41 N. Y. 272): "Want of jurisdiction is a matter which always may be interposed against a judgment * * * when any benefit is claimed for it". Positively, petitioner claims no benefit from the purported divorce decree; rather is it that respondent should not benefit from his own wrongful fraudulent action.

Naturally the point will be made that *Kerr* was decided in post Civil War days. So we look at the current decisions in New York. When we do we find confusion.

Following *Rosenstiel* v. *Rosenstiel,* 16 N. Y. 2d 64, 209 N. E. 2d 709 (1965), New York law is fluctuating rapidly on its policy and the interest in the State of its citizens. There the majority stated that a bilateral Mexican divorce offends "no public policy of this state". True, then there was but one ground for divorce in New York. A state of Chihuahua divorce, granted on less than one day's residence, may be as synthetic as the divorce case at bar. Both were consensual. But both the public policy of the States of Georgia and New York prohibit consensual divorce in 1967 as they did in 1869.

In *Dicks* v. *Dicks,* 177 Ga. 379, 382, the Supreme Court of Georgia flatly declared that for total divorce "Jurisdiction of the subject matter cannot be conferred by consent" on the mere submission of the parties.

> "One filing a petition for divorce must *allege* and *prove* that he has been a bona fide resident of the state for the length of time required by law. The *burden of proof is upon the applicant*" (Italics ours) (177 Ga. 379, 382).

Clearly, the New York courts may not extend into this State, and declare the law of a foreign state, with respect to New York citizens, to be either more or less than that already laid down by the highest court of the rendering sister state. New York courts are powerless in applying foreign law to dispense with proper plea, proof, and finding of jurisdictional domicil.

In *Rosenstiel* the New York Court of Appeals chose to nullify New York statutes without pretense of constitutional compulsion.

Currie, Suitcase Divorce, 34 U. Chi. L. R. 57.

We have seen that the Supreme Court of Georgia accords no recognition to a foreign decree of divorce, shown, by extrinsic evidence to be a nullity, when attacked by a person not a party thereto and a stranger whose personal rights are affected, *Cole* v. *Cole,* 221 Ga. 171, 143 S. E. 2d 637 (1965).

New York, on the contrary, follows mechanically the trend toward non-recognition of foreign divorces set out in Muelberger sixteen years ago. A recent pronouncement is that of *Magowan* v. *Magowan,* 19 N. Y. 2d 296 revg. 24 A. D. 2d 840 (Apr. 6, 1967). The husband, a stranger to the wife's prior divorce decree, defended on the ground that it was void jurisdictionally. Reversing the Appellate Division and citing the instant case as authority, the Court of Appeals stated that full faith and credit must be accorded to the wife's Alabama decree because

> "it is not clear, under Alabama law, whether the defendant being a stranger to that decree, has standing to attack it."

Accordingly, Mr. Magowan was relegated to Alabama courts for relief, if any.

Similarly, petitioner in effect has been relegated for relief to the State of Georgia.

This harsh ruling consigns petitioner to life-time bastardy, without a trial on the merits. Negro children in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), received

no such treatment concerning the psychological effect of "separate but equal" education:

> "To separate them • • • generates a feeling of inferiority as to their status, in the community • • • in a way unlikely ever to be undone." (347 U. S. at 494.)

While the majority of the New York Court of Appeals held recognition of the *Rosenstiel* bilateral Mexican divorce, as a matter of comity, did not offend the public policy of the State of New York, Chief Judge Desmond and Judge Scillepi strongly dissented on that point. Both judges cited *Caldwell* v. *Caldwell*, 298 N. Y. 146, 81 N. E. 2d 60 (1948), holding Mexican divorces obtained without personal appearance before the court, as in the case at bar, were forbidden by New York public policy prohibiting contracts to divorce (now General Obligations law). (Section 5-311, formerly Section 51, Domestic Relations Law).

The difference of opinion has been resolved, however, by the New York legislature shortly after *Rosenstiel* by liberalizing grounds for divorce (N. Y. Dom. Rel. Law, Section 170). The statutes are effective in part September 1st, 1966 and September 1st, 1967. One of the latter provides a test for proof of New York domicile in migratory divorce, indicating that domicile of one party outside New York is required in 1967 as its public policy (N. Y. Dom. Rel. Law, Section 250):

> "*Divorces obtained outside the State of New York.* Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return

maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty seven."

If the argument of Professor Currie is right that consensual divorces currently offend New York policy (U. Chi. L. R., vol. 34, 62-64), it follows that the court below has openly disregarded the declared public policy of both states, New York and Georgia. The decision reached violates, we submit, both the fundamental fairness doctrine of due process and constitutes unequal enforcement of laws against petitioner.

The interest of the State of New York is as compelling, petitioner being a ward of the court, as that expressed in *Estin*. Certainly Georgia has and could have no interest or concern in the *status* of petitioner in the domiciliary state of himself and family. New York's interest in the support of wives domiciled there is clearly shown in *Estin*. To relegate the infant petitioner to Georgia, with which no substantial contacts exist or ever existed is to deny justice to him.

The court below was in the position, though not acknowledged by it, of *parens patriae* to the infant petitioner. Recently, this Court has enforced the Fourteenth Amendment guarantees in *parens patriae* proceedings involving juveniles (*In re Gault*, U. S. Law Week, Vol. 35, 4399, 4403).

The position of the court as a "wise, affectionate and careful parent", acting for the protection of the property interests and person of a child, is quaint but inadequate.

Conditions of the Twentieth Century are urban, industrial and mobile. It presents a far cry from conditions prevailing in Eighteenth Century England (*Queen* v. *Gyngall*, 1893, 2 Q. B. Div. 232, 238). Its use, or rather tacit misuse, below has operated to the disadvantage of petitioner's person and to the detriment of his constitutional rights.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Clifton F. Weidlich,
Attorney for Petitioner,
55 Liberty Street,
New York, N. Y. 10005.

APPENDIX A

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of February, 1966.

Present—Hon. CHARLES D. BREITEL,
Justice Presiding
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices

9792

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,
Plaintiff-Respondent,

vs.

STUART M. GOLDSMITH,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 30th day of March, 1965, denying defendant's motion to dismiss the complaint, and said appeal having been argued by Mr. Gerald I. Lustig of counsel for the appellant, and by Mr. Clifton

F. Weidlich of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, with $50 costs and disbursements to the appellant, and defendant's motion to dismiss the complaint granted, with $10 costs, and the Clerk is directed to enter judgment in favor of the defendant dismissing the complaint, with costs.

Enter:

HYMAN W. GAMSO
Clerk.

Filed Feb. 15, 1966

APPENDIX B

Opinion of Appellate Division, First Department

Before BREITEL, J. P. and MCNALLY, STEVENS, EAGER and STEUER, JJ.

PER CURIAM.

Order, entered March 30, 1965, unanimously reversed, on the law, with $50 costs and disbursements to the defendant, and motion of the defendant-appellant to dismiss the complaint granted, with $10 costs. The complaint does not show the existence of a bona fide justiciable controversy. Absent such showing, the court should not take jurisdiction of the action. (See Red Robin Stores v. Rose, 274 App. Div. 462, 84 N.Y.S.2d 685; Robert E. Tompkins, Inc. v. Security Trust Co., 277 App.Div. 1090, 101 N.Y.S. 2d 311; Strauss v. University of State of New York, 282 App.Div. 593, 125 N.Y.S.2d 821.) The plaintiff alleges that he is the natural child of the defendants, born approximately two years after they were divorced by decree of the Georgia Superior Court, and he prays for judgment declaring that the decree is invalid and that he is the lawful child of the defendants. The documentary evidence submitted on this motion, however, establishes that the Georgia decree is immune from collateral attack. It appears that the defendants, then husband and wife, voluntarily submitted to the jurisdiction of the Georgia Superior Court, Richmond County, and that the decree of divorce rendered by such court on May 27, 1952, recites "that the Court has jurisdiction of the parties to this libel for divorce". While the record of the proceedings and the decree of the Georgia Superior Court contain no statement showing a residence of either party in the State

of Georgia, except an unverified recital in the petition of the petitioner's residence in Richmond County, Georgia, there is no requirement under Georgia law that the petitioner's residence be pleaded or established in any particular form. In any event, a lack of residential requirements does not affirmatively appear on the record. In the absence of a jurisdictional defect appearing on the face of the record, the divorce decree is conclusively binding on the parties who voluntarily submitted to the jurisdiction of the court and upon all persons claiming through them. The decree would not be subject to collateral attack in Georgia. (See Phillips v. Phillips, 15 Misc.2d 884, 180 N.Y.S.2d 475, and cases cited; Kicklighter v. Kicklighter, 217 Ga. 54, 121 S.E.2d 122; Owenby v. Stancil, 190 Ga. 50(6), 58, 8 S.E.2d 7; Martocello v. Martocello, 197 Ga. 629, 631, 30 S.E.2d 108; Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443; Wash v. Dickson, 147 Ga. 540, 94 S.E. 1009, 1010, 1011; Jones v. Smith, 120 Ga. 642, 48 S.E. 134.) Since it is not subject to collateral attack in Georgia, the rendering state, the decree is entitled to full faith and credit here and it may not be attacked in this action brought here. (See Johnson v. Muelberger, 340 U.S. 581, 71 S.Ct. 474, 478, 95 L.Ed. 552; Boxer v. Boxer, 12 Misc. 2d 205, 177 N.Y.S.2d 85, affd. 7 A.D.2d 1001, 184 N.Y.S.2d 303, affd. 7 N.Y.2d 781, 194 N.Y.S.2d 47, 163 N.E.2d 149; Klarish v. Klarish, 19 A.D.2d 170, 241 N.Y.S.2d 179, affd. 14 N.Y.2d 662, 249 N.Y.S.2d 869, 198 N.E.2d 902; Cavallo v. Cavallo, 45 Misc.2d 467, 257 N.Y.S.2d 186.) Finally, inasmuch as the validity of defendants' said divorce may not be questioned, this action will not lie to resolve an alleged issue of paternity. (Anonymous v. Anonymous (n. o. r.), 17 Misc. 2d 187, 184 N.Y.S.2d 219) The decision of Urquhart v. Urquhart, 185 Misc. 915, 57 N.Y.S.2d 734,

affd. 270 App.Div. 759, 59 N.Y.S.2d 921, 188 Misc. 613, 66 N.Y.S.2d 472, affd. 272 App.Div. 60, 69 N.Y.S.2d 57, affd. 297 N.Y. 689, 77 N.E.2d 1; 196 Misc. 664, 92 N.Y.S.2d 484, affd. 277 App.Div. 752, 97 N.Y.S.2d 200 is not controlling. There, it was held that the foreign decree of divorce was subject to collateral attack and, on such basis, the plaintiff sought and was entitled to a declaration of the relationship of legitimate parentage. Here, however, in light of Johnson v. Muelberger (supra), decided by the United States Supreme Court subsequent to the *Urquhart* decision, and in view of the other authorities cited supra, we have concluded that the Georgia decree is not subject to attack here and certainly, there is no justification for the maintenance of this action for a determination of paternity where the plaintiff may not succeed in his claim of legitimate parentage.

APPENDIX C

Amended Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of May A. D. 1967.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

1 Mo. No. 512

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Appellant,

vs.

STUART M. GOLDSMITH,

Respondent,

AND

FLORENCE D. GOLDSMITH,

Defendant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions involving the construction of the Constitution of the United States, viz.: Plaintiff contended that defendant's divorce decree procured in Georgia was entitled, as against him, to no protection under the full faith and credit clause of such Constitution and that the judgment dismissing the complaint deprives plaintiff of liberty without due process of law and of the equal protection of the laws contrary to the Fourteenth Amendment thereto. The Court of Appeals held that there was no violation of plaintiff's rights under the Constitution of the United States.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

Appendix C

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,

The Hon. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR February 28, 1967.

1. No. 283. 66

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Appellant,

VS.

STUART M. GOLDSMITH,

Respondent,

AND

FLORENCE D. GOLDSMITH,

Defendant.

BE IT REMEMBERED, That on the 10th day of June in the year of our Lord one thousand nine hundred and sixty-six, Patrick D. Goldsmith, by Edward S. Blackstone, his Guardian ad Litem, the appellant—in this cause, came here unto the Court of Appeals, by Weidlich & Rogers, his

attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Stuart M. Goldsmith, the respondent—in said cause, afterwards appeared in said Court of Appeals by Glazer & Pollack, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Clifton F. Weidlich, of counsel for the appellant, and by Mr. Gerald I. Lustig, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
of the State of New York.

APPENDIX D

Statutes Involved

United States Constitution, Article IV

Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Record, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Title 28, §1738 U. S. C.

The records and judicial proceedings of any court of any such State . . ., or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

United States Constitution, Amendment XIV

§1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

N. Y. Civil Practice Law and Rules

3211(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on ground that:

1. a defense is founded upon documentary evidence; or

7. the pleading fails to state a cause of action.

N. Y. General Obligations Law

§5-311. Certain agreements between husband and wife void. A husband and wife cannot contract to alter or dissolve the marriage. . . .

Georgia Statutes, Code of Georgia, 1933, as Amended

§110-701:

A void judgment may be attacked in any court and by any person. In all other cases judgments may not be impeached collaterally, but must be set aside by the court rendering them.

§110-709:

The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it.

§110-706:

Any judgment, verdict, rule or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury;

and it shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury, the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually vacated and set aside.

§30-107:

No court shall grant a divorce of any character to any person who has not been a bona fide resident of the State six months before the filing of the application for divorce.

AUG 19 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 422

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

GERALD I. LUSTIG,
Attorney for Respondent,
580 Fifth Avenue,
New York, New York 10036.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Statutes Involved	4
Statement of the Case	5
Reason for Denying the Writ	8
A. The Federal questions involved have been explicitly foreclosed by prior decisions of this Court	8
B. Respondent's Argument	9
POINT I—No jurisdictional defect appears upon the record of the Georgia proceedings and the divorce decree rendered therein is valid on its face	10
POINT II—(a) A collateral attack upon a foreign divorce decree valid on its face is permissible in New York only if permissible in the rendering state	13
(a) Respondent's divorce decree, unassailable in Georgia, cannot be collaterally attacked in New York	18
POINT III—Respondent is not entitled to a declaratory judgment for the purpose of determining an alleged issue of paternity since he cannot succeed in his claim of legitimate parentage	23
C. Petitioner's Contentions are Without Merit	27
Conclusion	39
APPENDIX A—Judgment	40
APPENDIX B—Statutes Involved	42

TABLE OF CASES:

	PAGE
Anon. v. Anon., 184 N.Y.S. 2d 219 (1955)	23
Boston v. Jackson, 260 U. S. 309 (1922)	8
Clarke v. Clarke, 97 N.Y.S. 2d 17	25
Coe v. Coe, 334 U. S. 378	34
Cole v. Cole, 221 Ga. 171	37
Cook v. Cook, 342 U. S. 126	30
Dicks v. Dicks, 177 Ga. 379	37
Equitable Life Assur. Soc. v. Brown, 187 U. S. 308 (1902)	8
Haan v. Haan, 231 N.Y.S. 58	25
Henry v. State of Mississippi, 381 U. S. 908	28
Hicks v. Hicks, 186 Ga. 362, 197 S. E. 878	22
Hough v. Light, 89 N.Y.S. 2d 361	25
Hutton v. Bretsch, 216 N. Y. 23	24
In Re Pugarelli's Estate, 173 N.Y.S. 2d 904 (1958)	17
Johnson v. Muelberger, 340 U. S. 581 (1951)	passim
Johnson v. Muelberger, 301 N. Y. 13 (1950)	13
Jones v. Smith, 120 Ga. 642, 48 S. E. 134	29
Kienle v. Kienle, 107 N.Y.S. 2d 239 (1951)	16
King v. King, 74 N.Y.S. 2d 181	25
Louisville & Nashville Railroad Company v. Milton, 218 U. S. 36 (1910)	8
Matter of Bancroft, 88 N.Y.S. 2d 804	25
Matter of Lindgren's Estate, 293 N. Y. 18	26
Martocello v. Martocello, 197 Ga. 629, 30 S. E. 2d 108	22
McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286 (1915)	30
Orkin v. Orkin, 181 N.Y.S. 2d 272 (1958)	17, 27

TABLE OF STATUTES:

PAGE

People ex rel. Lawton v. Snell, 216 N. Y. 527 24
Prager v. Manowitz, 276 N.Y.S. 875 25
Phillips v. Phillips, 180 N.Y.S. 2d 475 (1958) 19, 29, 30
Phillips v. Phillips, 211 Ga. 305, 85 S. E. 2d 427 (1955) 20
Schneider v. Kennat, 47 N.Y.S. 2d 180 (1944) 24
Sherrer v. Sherrer, 68 S. Ct. 1087, 334 U. S. 343, 92 L. Ed. 1429 (1948) 32
Thomas v. Lambert, 187 Ga. 616, 1 S. E. 2d 443 21
Urquhart v. Urquhart, 66 N.Y.S. 2d 472, 69 N.Y.S. 2d 484 ..... 8, 25
Waldor v. Waldor, 123 S. E. 2d 660 (1962) 21
Williams v. North Carolina, 325 U. S. 226 (1945) .. 32
28 United States Code, Section 1257(3) 3, 4
28 United States Code, Section 1738 4
New York Civil Practice Law and Rules, Section 3211(a) subdivisions 1 and 7 .....4, 5, 9
New York Family Court Act, Article V, Section 517(a) 4, 6
Code of Georgia 1933, as amended:
Section 81-503 4
Section 110-701 ..... 4, 18
Section 110-702 4
Section 110-706 4
Section 110-708 4
Section 110-709 ..... 4, 18
Section 3-702 4
Section 30-107 4
Section 37-813 ..... 4, 20

MISCELLANEOUS:

27 Corpus Juris Secundus, Sec. 170, p. 813 20
17 American Jurisprudence 390, Section 479 20
Commentary on the Domestic Relations Law, McKinney's Consolidated Laws of New York, pp. 38, 39 32
Constitution of the United States:
Article IV, Sections 1, 2 ..... 4, 13
14th Amendment, Section 1 4

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Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent respectfully prays that the petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York entered in the above entitled action on February 28, 1967 be denied.

Opinions Below

1. The order entered March 30, 1965 and the opinion of the Supreme Court, New York County, at Special Term, Part III, which denied respondent's motion for an order dismissing the complaint herein pursuant to Rule 3211(a) (1) and (7) of the New York Civil Practice Law and Rules (R. 3-8).*

* The pagination is to the Record on Appeal.

2. The order and *per curiam* opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on February 15, 1966, which reversed on the law with costs and disbursements the above-mentioned order entered March 30, 1965 and which granted respondent's motion to dismiss the complaint with costs (Appendices A and B of petitioner's petition herein).

3. Judgment of the Supreme Court of the State of New York, County of New York, entered on July 25, 1967, which dismissed the complaint herein with costs, pursuant to the above-mentioned order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on February 15, 1966 (Appendix A of respondent's brief herein).

4. Judgment of the Court of Appeals of the State of New York, entered on February 28, 1967, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on February 15, 1966, without opinion (Appendix C of petitioner's petition herein).

5. The amended remittitur of the Court of Appeals of the State of New York, entered on May 23, 1967 (Appendix C of petitioner's petition herein.)

The action in all the courts below named as a co-defendant petitioner's mother, Florence D. Goldsmith, former wife of respondent, who joined her son, petitioner herein, in seeking a declaratory judgment declaring (a) the invalidity of the decree of divorce obtained by her in May, 1952, in the State of Georgia in an action in which both parties appeared, said Florence D. Goldsmith having been physically present in the State of Georgia and respondent having filed a notice of appearance and answer therein, and (b) that petitioner, born in March, 1954, whose paternity is denied by respondent, is the "lawful issue" of said Florence D. Goldsmith and respondent (R. 18).

Jurisdiction

A writ of certiorari is requested by petitioner to review the judgment of affirmance by the Court of Appeals of the State of New York of the order of the Appellate Division of the Supreme Court of the State of New York, First Department, dismissing the complaint herein.

Respondent submits that petitioner has failed to establish that the jurisdiction of the United States Supreme Court should be invoked under Title 28, 1257(3) of the United States Code to review the judgment of affirmance, on the ground that no novel matter for review has been presented and that, on the contrary, the Federal questions involved have been so explicitly foreclosed by prior decisions of this Court as to leave no room for contention on the subject and hence cause the questions to be frivolous and, therefore, inadequate to confer jurisdiction.

Questions Presented

1. Does the full faith and credit clause of Article IV, Section 1, of the United States Constitution, as expounded in *Johnson* v. *Muelberger*, 340 U. S. 581, preclude the petitioner from challenging the validity of his putative parents' Georgia decree of divorce, obtained in an action in which both parties appeared, which decree of divorce, valid on its face, is unassailable in Georgia, the rendering state, petitioner having been born in New York, the domiciliary state of the putative parents, some 22 months after the entry of said decree of divorce?

2. Is the due process or equal protection clause of the Fourteenth Amendment to the United States Constitution violated by precluding petitioner from attacking the Georgia divorce decree of his putative parents solely for

the purpose of resolving the issue of his paternity when he may not succeed in his claim of legitimate parentage?

3. Does recognition by the New York courts of the Georgia decree of divorce, rendered by the Superior Court of Georgia, in an action in which both parties appeared and no jurisdictional defect was apparent on the face of the decree or record of divorce proceedings, violate the full faith and credit and privileges and immunities provisions of Article IV, Sections 1 and 2, as well as of the Fourteenth Amendment of the United States Constitution?

4. Did the New York courts contravene Section 1 or Section 2 of Article IV of the United States Constitution and extend more faith and cerdit in New York to the Georgia divorce record and decree than would be accorded by Georgia, the rendering state?

Statutes Involved

This petition involves Article IV, Sections 1 and 2, of the United States Constitution, and the due process and equal protection of laws provisions of the Fourteenth Amendment, Section 1, thereto, and Title 28, Section 1738 of the United States Code, and Title 28, Section 1257(3) of the United States Code.

New York State Statutes involved are Rules 3211(a), subdivisions 1 and 7, of the Civil Practice Law and Rules, and Family Court Act, Article V, Section 517(a).

Georgia State Statutes involved are Sections 81-503, 110-701, 110-702, 110-706, 110-708, 110-709, 3-702, 30-107 and 37-813 of the Code of Georgia, 1933, as amended.

All Statutes are printed in pertinent part as Appendix B.

Statement of the Case

Petitioner, aged 13 years, alleging that he is the son of respondent and Florence D. Goldsmith (named in the caption of this action in the courts below as a defendant and hereinafter sometimes referred to as "defendant"), born on March 6, 1954, 22 months after his mother obtained a Georgia divorce decree from respondent in an action in which both parties appeared, sues for a declaratory judgment (1) that the said divorce decree, rendered 14 years prior to the institution of this action, is invalid; (2) that he is the *lawful* child of respondent and defendant; and (3) for a declaration of any other rights, privileges and jural relationships of the parties as may be necessary and proper in the premises (R. 10-16).

Respondent, who denies that he resumed cohabitation with petitioner's mother after the divorce and denies that petitioner is his child, contends that irrespective of the child's parentage, the complaint was properly dismissed: (a) pursuant to New York Civil Practice Law and Rules Section 3211(a) (1) on the ground that there is a defense to petitioner's cause of action founded upon the said divorce decree and record of divorce proceedings (R. 43-53), establishing that there is no jurisdictional defect on the face of the decree or record; that no collateral attack can be launched against the decree in Georgia, the rendering state (R. 103-105), and that, accordingly, for Constitutional reasons, the judgment is unassailable in New York; and (b) pursuant to New York Civil Practice Law and Rules Section 3211(a) (7) on the ground that the complaint fails to state a cause of action as petitioner's allegations as to his paternity, even if true, would not entitle him to a judgment declaring him to be *lawfully* born, as prayed for, since his putative parents were duly divorced twenty-two months prior to his birth by a decree which he cannot attack; therefore, all he could prove, at best, is that he is

respondent's *illegitimate* son, as to which status no declaratory judgment would be rendered under the laws of the State of New York.

Respondent also contended below that this claim is barred by laches, having been asserted for the first time in 1960, some six years after petitioner's birth, when his mother's romance with the man generally accepted as petitioner's father was terminated (R. 77).

Petitioner in his "Statement of the Case" proceeds from the premise that respondent and Florence D. Goldsmith are his parents. It is significant, however, that despite petitioner's admission in Paragraph 3 of his complaint that respondent "has defrayed little or none of the expenses of plaintiff's maintenance, support or education" (R. 13), his mother failed to institute proceedings under the applicable New York statutes to establish paternity. Such proceedings are now barred in Family Court by operation of the two year Statute of Limitations, no acknowledgment of paternity having been made by respondent either in writing or by way of support, *New York Family Court Act, Section 517*.

Also, formal claim for support of petitioner was made by his mother against respondent for the first time on January 10, 1962 in Family Court, New York County, almost eight years after plaintiff's birth. Upon respondent's denial of paternity, no support order was made. The next formal claim against respondent for petitioner's support was made in Family Court on April 10, 1964; here again, in view of respondent's denial of paternity, the expiration of the Statute of Limitations within which to establish paternity and the absence of any express acknowledgment of paternity by respondent, no support order was made in the Family Court in accordance with the provisions of the New York Family Court Act.

Respondent's attorney alleges that at this last appearance in Family Court when petitioner's mother was again

frustrated in her attempts to collect money from respondent, her attorney stated:

> "We'll be back here—make no mistake about it. Maybe we won't prove paternity here, but we'll move to knock out the divorce, getting a declaratory judgment in Supreme Court and then we'll see you in Family Court and get the support she wants." (R. 88)

In line with the threat, this action was instituted and despite the self-righteous allegations throughout the petition that dollars and cents have nothing to do with this action, the conclusion was irresistible that the object of the exercise was to circumvent the Statute of Limitations which now prevent paternity proceedings in Family Court, by obtaining a declaration that petitioner is respondent's son through this devious scheme of attacking a valid decree of divorce, and equipped with such a finding, to return to Family Court to obtain an order of support.

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously held that the documentary evidence, i.e., the record of the Georgia divorce proceedings, submitted in support of the motion to dismiss the complaint, established that the Georgia decree was immune from collateral attack; that the divorce decree recited "that the court has jurisdiction of the parties to this libel for divorce"; that a lack of residential requirements did not, therefore, affirmatively appear on the record and the statement in the complaint in the Georgia action that the plaintiff therein had been a resident of Richmond County, Georgia, for more than six months prior to the filing of the petition was sufficient to establish compliance with residential requirements, since under Georgia law that residence need not be pleaded or established in any particular form; that in the absence of a jurisdictional defect on the face of the record, the decree was conclusively binding on the parties thereto and on all persons claiming through

them; that the decree was not subject to collateral attack in Georgia and, therefore, it "is entitled to full faith and credit here and it may not be attacked in this action brought here" (Appendix B to Petition, pp. 29, 30).

The memorandum decision also held that inasmuch as the validity of the divorce decree could not be challenged, the action would not lie to resolve an alleged issue of paternity, specifically finding that *Urquhart* v. *Urquhart*, 277 A. D. 752, upon which petitioner's action was predicated, had been overruled by *Johnson* v. *Muelberger*, 340 U. S. 581 (Appendix B to Petition, p. 31).

The Court of Appeals of the State of New York affirmed the order dismissing the complaint (Appendix C to Petition, pp. 34, 35), and petitioner now seeks a writ of certiorari to review the judgment of the Court of Appeals.

Reason for Denying the Writ

A. The Federal questions have been explicitly foreclosed by prior decisions of this Court.

It is respondent's contention that it is beyond cavil that the Federal questions relied upon in this matter have been so explicitly foreclosed by prior decisions of this Court as to leave no room for contention on the subject and hence cause the questions raised to be frivolous and therefore wholly inadequate for the purpose of conferring jurisdiction upon this Court.

Louisville & Nashville Railroad Co. v. *Milton*, 218 U. S. 36 (1910).

Indeed, the questions presented by the petition are so wanting in substance, in view of previous decisions of this Court, as not to require further argument.

Boston v. *Jackson*, 260 U. S. 309 (1922);
Equitable Life Assur. Soc. v. *Brown*, 187 U. S. 308 (1902).

Respondent respectfully submits, therefore, that a cursory examination of his argument and of the grounds urged by petitioner for review, as outlined hereinbelow, will lead this learned Court to the conclusion that its decision in *Johnson* v. *Muelberger*, 340 U. S. 581 (1951), consistently followed since its pronouncement and specifically held by the New York Courts to have overruled prior inconsistent decisions, is completely dispositive of the Federal questions presented by the petition and that accordingly, this Court is relieved from further consideration of the grounds urged for reversal of the judgment of the New York Court of Appeals and that it should deny the petitioner's prayer for a writ of certiorari.

B. Respondent's Argument.

The sole determination which the courts below were called upon to make on respondent's motion to dismiss the complaint under New York Civil Practice Law & Rules Section 3211(a)(1) and (7) was (a) whether the Georgia divorce decree is valid on its face, rendered in an action for divorce in which both parties appeared voluntarily and without duress or fraud on the part of either party as against the other, with full opportunity to each to litigate any issue, including the issue of jurisdiction, with a record affirming the facts of residence of the plaintiff in said divorce action, evidencing full compliance with juridictional requirements, with no defect appearing on its face; and (b) whether such a decree could be attacked collaterally in Georgia by a stranger to the original proceeding.

Respondent contends (a) that the documentary evidence (R. 43-53) establishes that the divorce decree was valid on its face and free from any jurisdictional defect and (b) that the applicable decisions of Georgia law, analyzed and applied to the case at bar by E. Smythe Gambrell, Esq., an outstanding Georgia attorney and past President of the

American Bar Association, in his two affidavits submitted in support of the motion (R. 54-63 and R. 98-105), establish that the decree in question is unassailable in Georgia.

Since petitioner could not launch such an attack in Georgia, the rendering state, he cannot collaterally attack the divorce decree in this state, by virtue of the Full Faith and Credit clause of the Constitution.

Accordingly, petitioner, whether legitimate or illegitimate, child of the parties sued herein or not, cannot attack the decree for Constitutional reasons. Therefore, he would not be entitled to the relief requested in paragraph (1) of his prayer for relief (R. 14), wherein he seeks a judgment nullifying the divorce decree in question, nor in paragraph (2) thereof (R. 15), wherein he seeks a judgment declaring that he is the *lawfully* born child of respondent and petitioner's mother, for whether or not he is respondent's child, he cannot be declared his *lawfully* born child since the divorce decree procured by the petitioner's mother twenty-two months before petitioner's birth is unimpeachable by anyone and the putative parents were not man and wife when petitioner was conceived.

POINT I

No jurisdictional defect appears upon the record of Georgia proceedings and the divorce decree rendered therein is valid on its face.

The documentary evidence

The decree of divorce which petitioner challenges was duly obtained in the Superior Court, Augusta Circuit, Richmond County, Georgia, in a proceeding entitled "*Florence A. Goldsmith v. Stuart M. Goldsmith*", Number 8085. Plaintiff in that divorce action was personally before the Georgia Court, her petition alleging that she had been a resident in the County of Richmond, State of

Georgia for more than six months prior to the filing of such petition and all pleadings signed by her in said action were executed before a Georgia Notary Public, who also signed. Respondent appeared in the action, having acknowledged service of the petition and having entered a general appearance and filed his answer.

An analysis of the original record in the Georgia divorce action (R. 43-53) discloses the following ("plaintiff" and "defendant" as used hereinbelow in such analysis refer to the parties in the Georgia action):

(a) *Petition.* Plaintiff alleged she was a resident of Richmond County, Georgia, and had been for more than six months prior to filing petition; that defendant was a non-resident; that the parties married February 15, 1947 and thereafter separated; that cause of separation was enough to justify divorce within the meaning of the Georgia Code; that plaintiff had not condoned this conduct on part of defendant; that one child was born of the marriage, to wit, Nancy, on April 22, 1951; and the petition concluded with a prayer that process be directed to defendant and that plaintiff have a total divorce from him on legal principles. The petition was signed by R. Lee Chambers, III, plaintiff's attorney, and also by the plaintiff therein under oath taken before Mary Comer Phillips, Notary Public, Richmond County, Georgia.

(b) *Verification of the Petition.* By separate instrument, plaintiff verified the petition, swearing to it on April 25, 1952, before a Notary Public in Georgia.

(c) *Defendant's Acknowledgment of Service.* By instrument signed and acknowledged by defendant, he admitted due and legal service of the petition for divorce and waived any other notice, agreeing among other things that the plaintiff's testimony could be taken in writing on May 1, 1952. By the language of

said acknowledgment of service, defendant "entered a general appearance in said case and acknowledged the jurisdiction of the Superior Court of Richmond County, Georgia".

(d) *Process.* By process dated April 29, 1952, defendant was summoned to appear at the Superior Court of said County and State on the third Monday of May, 1952, to answer the plaintiff's charges.

(e) *Answer of Defendant.* By answer signed by defendant, he admitted certain paragraphs of plaintiff's petition and denied other paragraphs, said answer having been "filed in office this 14th day of May, 1952" signed by the Clerk of the Court.

(f) *Deposition.* The plaintiff's deposition, swearing to the truth of the allegations of her petition and setting forth the cause of separation, was signed by the plaintiff and sworn to before a Notary Public in Richmond County, Georgia on May 1, 1952, and is stamped as filed on the 13th of May, 1952, signed by the Clerk of the Court.

(g) *Final Judgment and Decree of Divorce.* The divorce decree contains a statement that it appears "to the court from the evidence that the defendant has been duly served as required by law and is properly before the court and that the court has taken jurisdiction of the parties to this libel for divorce", and grants a total divorce dissolving the marriage contract as fully and effectually as if no such contract had ever been made.

Therefore, there is no jurisdictional defect apparent upon the face of the record of proceedings in the Georgia divorce action and the divorce decree rendered therein appears on its face to be valid and enforceable.

POINT II

(a) A collateral attack upon a foreign divorce decree valid on its face is permissible in New York only if permissible in the rendering state.

The principal question which petitioner would have this Court review is whether or not petitioner, a stranger to the Georgia divorce decree, can attack the decree collaterally in the courts of New York.

The unequivocal answer has already been given by this Court in a long and distinguished line of authority which established that under the Full Faith and Credit Clause of the Constitution, a collateral attack is not permitted on a divorce decree on jurisdictional grounds where there had been participation by both parties in the proceedings, where defendant had been accorded full opportunity to contest the jurisdictional issues and where the decree is not susceptible to such collateral attack in the courts of the rendering state. U.S.C.A., Const. Art. 4, § 1. Under the Full Faith and Credit Clause, not only is a party who had been personally served or who had entered a personal appearance in such proceeding barred from collaterally attacking a divorce decree, valid on its face, but a stranger to the proceedings in the rendering state would be similarly barred if the party attacking would not be permitted to make a collateral attack in the courts of the granting state.

The leading case in which this Court has heretofore determined conclusively the Constitutional issues which petitioner would submit for review, is *Johnson* v. *Muelberger*, 340 U. S. 581 (1951), in which this Court reviewed a decision of the New York Court of Appeals, *Johnson* v. *Muelberger*, 301 N. Y. 13 (1950), permitting a decedent's Florida divorce to be set aside by his daughter. The New York Court of Appeals had concluded that under

Florida law the daughter would be permitted to launch such an attack in that state, and that, therefore, she could also do so in New York. This Court agreed with the rationale of the New York Court of Appeals but reversed on the ground that Florida law would not permit a collateral attack by decedent's daughter in Florida, and held that under the Full Faith and Credit Clause of the Federal Constitution, since the daughter could not collaterally attack the decree in Florida, the rendering state, she could not attack it in any other jurisdiction.

This Court stated as follows in its opinion in *Johnson* v. *Muelberger, supra:*

> "The right of a daughter to attack in New York the validity of her deceased father's Florida divorce is before us. * * *
>
> "The Court of Appeals [of New York] held that the Florida judgment finding jurisdiction to decree the divorce bound only the parties themselves. This followed from their previous opportunity to contest the jurisdictional issue. As the court read the Florida cases to allow Eleanor to attack the decree collaterally in Florida, it decided she should be equally free to do so in New York. The Court of Appeals reached this decision after consideration of the Full Faith and Credit Clause. Because the case involves important issues in the adjustment of the domestic-relations laws of the several states, we granted certiorari, 340 U. S. 874, post, 635, 71 S. Ct. 121.
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> "The clause and the statute prescribing the effect in other states of judgments of sister states are set out below. [U. S. Con. Art. Y, Sec. 1] * * *
>
> "This constitutional purpose promotes unification, not centralization. It leaves each state with power over its own courts but binds litigants, wherever they may be in the Nation, by prior orders of other courts with jurisdiction. 'One trial of an issue is enough.'

The principles of res judicata apply to questions of jurisdiction as well as to the other issues as well to jurisdiction of the subject matter as of the parties. The federal purpose of the clause makes this Court, for both state and federal courts, the 'final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause.'

"In the exercise of this responsibility we have recently restated the controlling effect of the clause on state proceedings subsequent to divorce decrees in other states. • • •

"It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state. This rule the Court of Appeals recognized. 301 NY 13, 17, 92 NE2d 44. It determined, however, that a 'stranger to the divorce action,' as the daughter was held to be in New York, may collaterally attack her father's Florida divorce in New York if she could have attacked it in Florida.

"No Florida case has come to our attention holding that a child may contest in Florida its parent's divorce where the parent was barred from contesting, as here, by res judicata. • • •

"We conclude that Florida would not permit Mrs. Muelberger to attack the Florida decree of divorce between her father and his second wife as beyond the jurisdiction of the rendering court. In that case New York cannot permit such an attack by reason of the Full Faith and Credit Clause. When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state,

it cannot be attacked by them anywhere in the Union. 'The Full Faith and Credit Clause forbids.''

The holding of this Court in the *Johnson* case, *supra,* is now the law of our land and has been consistently followed by the New York courts. For example, in *Kienle* v. *Kienle,* 107 N.Y.S. 2d 239 (1951), an action by a wife for an annulment on the ground that the husband's Florida divorce from his first wife was void, the court dismissed the complaint, holding that since the second wife could not attack the divorce in Florida, she was barred from doing so in New York, and stating:

> "In *Matter of Johnson's Estate* (Muelberger), 301 N. Y. 13, 19 N. E. 2d 44, which was decided by the Court of Appeals of the State of New York, it was, in effect, held that in order for somebody, in a position such as the plaintiff in this case, to be permitted to attack a foreign decree, such as was granted to this defendant's former wife, it would have to be shown that such attack would be permitted by her in the courts of the State of Florida. The *Johnson* case went to the United States Supreme Court, *Johnson* v. *Muelberger,* 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552, and the United States Supreme Court, in effect, held that to be the test. The ultimate decision of the *Johnson* case as found by the Court of Appeals was reversed by the United States Supreme Court, because the United States Supreme Court held in that case that the Florida courts would not permit such an attack on their decree, which holding in that respect differed from the finding made by the New York Court of Appeals. But it is clear that under the law as enunciated by both the Court of Appeals and the United States Supreme Court in the *Johnson* case, it must be shown that this plaintiff would be permitted to attack the Florida decree in the courts of Florida

before she may be heard in the courts in the State of New York." (pp. 239, 242)

Again, in *In Re Pugarelli's Estate*, 173 N.Y.S. 2d 904 (1958), the son of a decedent by his first marriage sought to attack the validity of decedent's second marriage on the ground that it was entered into subsequent to an invalid Florida divorce. The New York court noted that the Florida decree would not be subject to collateral attack in the rendering state, and, consequently, could not be so attacked in New York. The court recognized United States Supreme Court's 1951 decision in *Johnson* v. *Muelberger*, *supra*, to be determinative of the issue, saying:

> "In *Johnson* v. *Muelberger* [citation omitted], the court held that the State of Florida would not permit a child of a former marriage to attack a divorce decree between her parents, and said 'when a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids.'" 173 N.Y.S. 2d 904, 906.

To the same effect was *Orkin* v. *Orkin*, 181 N.Y.S. 2d 272 (1958), in which the plaintiff wife sought to annul her marriage on the ground that her husband's prior Florida divorce was invalid. The Supreme Court dismissed her complaint, holding:

> "The plaintiff wife's marriage cannot be annulled for she is barred from attacking the Florida decree of divorce procured by the defendant husband against his former wife who voluntarily appeared in that State and consented to such decree. The rule forbidding a third party collateral attack on a decree of a sister state based on personal jurisdiction of both parties unless the attack is permissible in the rendering state is now firmly established (*Johnson* v. *Muelberger*,

340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552; *Kienle* v. *Kienle*, 201 Misc. 948, 107 N.Y.S. 2d 239; *Phillips* v. *Phillips*, Sup., 180 N.Y.S. 2d 475. . . ."

"The cases cited by plaintiff predate *Johnson, supra*, and are thus inappropriate. . . ." 181 N.Y.S. 2d 272, 273.

It is, therefore, a well established principle of law that under the Full Faith and Credit Clause a collateral attack upon a foreign decree, on the face of which no jurisdictional defect is apparent, will be permitted in another state only if such an attack would be permitted in the rendering state.

Accordingly, it was necessary in order to decide whether petitioner in the case at bar should be permitted to attack the Georgia divorce decree, valid on its face, to determine whether such an attack would be permitted in Georgia. The Appellate Division of the New York Supreme Court found that such an attack would not be permitted in Georgia, on the grounds set forth below.

(b) Respondent's divorce decree, unassailable in Georgia, cannot be collaterally attacked in New York.

It is well decided under Georgia law that neither party to a divorce proceeding, nor any stranger thereto, may challenge the jurisdiction of the Georgia court which rendered the divorce decree, valid on the face of the record, on the ground that the plainiff in the divorce action fraudulently misrepresented that the state's residence requirements had been fulfilled. Ga. Code, Secs. 110-701, 110-709.

Accordingly, by operation of the Full Faith and Credit Clause, since such a collateral attack is not permitted in Georgia, the prior decisions of this Court would preclude petitioner from launching such an attack in New York State.

Completely dispositive of the case under New York law is *Phillips* v. *Phillips*, 180 N.Y.S. 2d 475 (1958), in which a defendant husband in a New York action for separation instituted by his wife counterclaimed for an annulment "on the ground that at the time of the marriage plaintiff was still married to another," alleging the invalidity of the Georgia decree of divorce because of lack of jurisdiction, plaintiff in the divorce action having fraudulently represented that she had been a resident of Georgia for the statutory period. Judge Levy, therefore, in the *Phillips* case was faced with the precise issue here involved, namely, whether a stranger to a Georgia divorce decree, valid on its face, could successfully challenge its validity on the ground that the plaintiff in the Georgia divorce action had fraudulently misrepresented to the Georgia court that she had been a domiciliary of Georgia for the period required to confer jurisdiction. Judge Levy exhaustively examined statutory and case law of Georgia and determined that such an attack could not be made in Georgia, stating as follows:

> "The rule which prevents a party from attacking a Georgia divorce decree as void for want of the jurisdictional fact of proper venue, in the absence of the imperfection appearing on the face of the record similarly precludes either party from challenging the jurisdiction of the Georgia court which rendered the decree on the ground that the plaintiff in the divorce action fraudulently misrepresented that he was a domiciliary of Georgia who had fulfilled the State's one-year residence requirement." (p. 488)

The Learned Justice then applied the principle of *Johnson* v. *Muelberger*, *supra*, and held that such a collateral attack could, therefore, not be made in New York, stating:

> "In sum, I conclude that the defendant in the case at bar would not be permitted in the courts of Georgia to assail the divorce decree which his wife had ob-

tained in that state against her former husband, and that, having failed to establish that the divorce state would permit the defendant to attack the decree, he cannot in this State expect a contrary ruling. Accordingly, there is no merit in the counterclaim for annulment, and it is dismissed." (p. 495)

A Georgia case in point is *Phillips* v. *Phillips,* 211 Ga. 305, 85 S. E. 2d 427 (1955), in which an infant plaintiff brought a suit to set aside his parents' divorce. Plaintiff's father, who had remarried and had another child, died intestate, whereupon plaintiff instituted this action, challenging the validity of his parents' divorce on the ground that his mother at the time of the divorce proceeding was not a bona fide resident of Washington County, Georgia, and that since that marriage was never legally dissolved, his father's second marriage was invalid. In affirming a dismissal of the child's petition, the Superior Court stated:

> "That a minor child of a deceased father, who obtained a divorce from the child's mother, has no right to have the divorce decree set aside for a fraud which his father practiced upon the court in its procurement, is the attack here made upon the sufficiency of the petition to state a cause of action for the relief sought. Respecting judgments, it is the general rule that none but the parties to a judgment valid on its face can move directly for its nullification, that is, that 'a third person, not a party to the record, cannot go into a court and move to set aside a judgment which is not against him.' [citations omitted]"

The Court quoted from 17 Am. Jr. 390, Sec. 479, and 27 C.J.S., Divorce, Sec. 170, p. 813 stating the general rule that third parties cannot attack decrees collaterally, and then noted that plaintiff here seeks to base his case on Georgia Code Sec. 37-813 which states that "equity will grant relief as between the original parties [to a judgment]

or their privies in law, in fact, or in estate, except as therein stated." The Court continued, as follows, in language applicable to the case at bar:

> "In this case, as shown by our statment of the facts, the plaintiff seeks to set aside a divorce decree between his deceased father and his living mother. If successful in this, he and his mother will inherit the estate of his intestate father to the exclusion of his father's second wife and her minor child by him. For his right to do so he relies upon the privity which exists between him and his deceased father. This being so, we do not think that the petition shows any right in him to question the validity of the divorce decree which he attacks. Having obtained the decree, his father would have been conclusively estopped in law to assail the validity to the prejudice of innocent parties [citations omitted]; and it is an elementary principle of law that a privy, either in law, fact, or estate has no greater right than the one with whom he is in privity. Accordingly, since the plaintiff's father would have been estopped in law to attack and thus question the validity of the divorce which he procured from the plaintiff's mother, it logically follows that the plaintiff himself is also estopped to do so." 85 S. E. 2d 427, 931.

The Georgia court distinguished the *Phillips* holding, in *Waldor* v. *Waldor*, 123 S. E. 2d 660 (1962), in which it permitted a collateral attack on a divorce decree because the lack of jurisdiction of the court to enter such a decree *appeared* on the face of the record. In the case at bar, however, no lack of jurisdiction appears on the record.

Another Georgia case dealing with the issue is *Thomas* v. *Lambert*, 187 Ga. 616, 1 S. E. 2d 443, in which heirs of a deceased second spouse, not a party to his wife's divorce decree from her first husband, were not permitted to attack the divorce decree for the purpose of administering the estate as against the widow. The syllabus by

the court is divided into two parts, the first denying the collateral attack on the judgment, and the second part negating the possibility of a direct attack being permitted. The court stated in its opinion the following rule of law in Georgia: "A domestic judgment can not be collaterally attacked as void unless its invalidity appears on the face of the record."

Again, in *Martocello* v. *Martocello*, 197 Ga. 629, 30 S. E. 2d 108, a husband sued for a decree nullifying the divorce decree obtained by his wife from her former husband, contending that the Georgia court actually had no jurisdiction over the case and that therefore the divorce decree which he challenged was void. The court rejected this argument and would not permit an attack to be made on a judgment "regular" on its face.

To the same effect also was *Hicks* v. *Hicks*, 186 Ga. 362, 197 S. E. 878.

This court is respectfully referred in this connection to the two affidavits of E. Smythe Gambrell, Esq. (R. 54-63, 98-105), an outstanding Georgia lawyer, in active practice since his graduation from Harvard Law School over forty-four years ago, and a former President of the American Bar Association. After analyzing the record of the Georgia divorce proceedings which is before this Court and applying the principles of Georgia law, Mr. Gambrell rendered an erudite opinion, amply bolstered by authorities, determining that there is no jurisdictional defect on the face of this record and that no collateral attack would be permitted in Georgia.

Accordingly, by virtue of the Full Faith and Credit Clause, as applied by this Court in *Johnson* v. *Muelberger*, *supra*, a collateral attack by petitioner in New York has already been forbidden by this Court and hence the questions raised by petitioner on this petition for review have been so explicitly answered by this Court as to preclude further considerations.

POINT III

Respondent is not entitled to a declaratory judgment for the purpose of determining an alleged issue of paternity since he cannot succeed in his claim of legitimate parentage.

The Appellate Division of the Supreme Court of the State of New York held that "inasmuch as the validity of defendant's said divorce may not be questioned, this action will not lie to resolve an alleged issue of paternity" (Appendix B, Petition, p. 29). It is respectfully submitted that statutory and case law of the State of New York abundantly support such a decision.

It is the established law of the State of New York that the question of legitimacy may be determined in annulment or divorce actions or by courts of equity where property interests are involved. Also, cases have arisen in which a court has rendered a declaratory judgment that a man named by the mother as the father of a child born out of wedlock is not the father; others in which a man not the husband of the mother has been declared the father of a child born out of wedlock.

However, in no reported case in the State of New York has a declaratory judgment been granted at the insistence of a child over the objection of a putative father, as the sole issue to be decided in such an action. Paternity of illegitimates in contested cases is established pursuant to the provisions of the New York Family Court Act. Under said Act, also, the illegitimate's father can be compelled, in a proper proceeding in the Family Court instituted within the statutory period and pursuant to the statutory procedure establishing paternity, to pay support to the mother or to a welfare agency, but that obligation significantly does not run directly to the bastard.

A leading case in this field and completely dispositive of that issue is *Anon.* v. *Anon.*, 184 N.Y.S. 2d 219 (1959),

an action for a judgment declaring paternity instituted by an infant through his guardian-ad-litem, in which defendant moved to dismiss the complaint as not stating a cause of action. In granting the motion, the court stated:

> "In no reported case in New York has the type of judgment sought herein been pronounced at the instance of a child or its mother over the objection of a putative father. I believe there is no legal authority for such a judgment, and that the Court should not entertain the action. The motion to dismiss is accordingly granted without leave to replead."

Again in *Schneider* v. *Kennat,* 47 N.Y.S. 2d 180 (1944), an action to compel a putative father to support an illegitimate on the basis that the defendant had recognized the child as his own, the court held that the complaint did not state a cause of action, the court writing as follows:

> "Under the common law there is no obligation on the putative father to furnish the child with necessaries. In this state the responsibility of a father to render support for such a child exists only by virtue of statute. The proceedings by which the liability shall be determined and fixed are defined and controlled exclusively by the statute which must be in their substance strictly and fully complied with.
>
> "Article VIII of the DRL [presently Article 5 of the Family Court Act] outlines the procedure for establishing paternity throughout the State of New York and also directs the extent to which the putative father is liable and the manner in which the liability is imposed."

To the same effect also are the following cases:

People ex rel. Lawton v. *Snell,* 216 N. Y. 527;
Hutton v. *Bretsch,* 216 N. Y. 23;

Prager v. *Manowitz*, 276 N.Y.S. 875;
Hough v. *Light*, 89 N.Y.S. 2d 361;
Matter of Bancroft, 88 N.Y.S. 2d 804;
King v. *King*, 74 N.Y.S. 2d 181;
Clarke v. *Clarke*, 97 N.Y.S. 2d 17;
Haan v. *Haan*, 231 N.Y.S. 58.

Petitioner relies completely on *Urquhart* v. *Urquhart*, 66 N.Y.S. 2d 472 (1946), 69 N.Y.S. 2d 57 (1947), 92 N.Y.S. 2d 484 (1949), 297 N. Y. 689, which has inspired the case at bar and in which petitioner's counsel represented the plaintiff.

In the *Urquhart* case, plaintiff sought an adjudication that he was the son of defendants, his mother and the putative father. His claim, supported by his mother's testimony, but vigorously repulsed by the male defendant, was that he was the son of the defendants, born some three years after his mother had procured an Arkansas divorce from her co-defendant. He asserted that the male defendant was his father and that he was entitled to declaratory judgment to that effect; he also asserted that the defendants' divorce was void for want of jurisdiction, alleging that his mother had not met the residence requirements of the State of Arkansas prior to obtaining a divorce, and that accordingly, the decree being of no force and effect, the defendants were still married and therefore he was their leigitimate son.

The male defendant denied paternity and made a motion for judgment on the pleadings upon the theory that plaintiff, like the parties to the divorce action, was estopped from attacking the validity of the decree which must accordingly be treated as valid; that if valid plaintiff could not be his legitimate son; that the action could not be maintained to establish that he was the illegitimate son (*Haan* v. *Haan*, 133 Misc. 197, 231 N.Y.S. 58); and that the fact of parentage thus could not be a triable issue in this action.

The question on the motion for judgment on the pleadings was whether the Arkansas decree was binding upon a third party, such as a child conceived thereafter.

The lower court denied the motion for summary judgment on the authority of *Matter of Lindgren's Estate*, 293 N. Y. 18, which held that a daughter could attack the validity of divorce obtained by her father from her mother in Florida and thereby establish her right to administer and inherit her father's estate to the exclusion of his widow whom he had married after obtaining the Florida decree.

On appeal, the court affirmed the denial of the motion stating that although it was the public policy of the State of New York at that time not to permit parties to such a divorce action to challenge the decree obtained by their fraud, *innocent third parties were not estopped from attacking the decree collaterally.* The court in affirming the denial of the motion for judgment on the pleadings again relied on *Matter of Lindgren's Estate, supra,* stating that a child of the marriage who had not been a party to the divorce action could thereafter challenge the validity of the foreign court's decree although the parties thereto were estopped from assailing such judgment, which, of course, is *not* the law today.

Accordingly, in view of the finding in the *Urquhart* case, based on the law at the time, that plaintiff, if a child of the parties, would have a right to challenge the validity of the defendants' divorce decree, the court heard evidence on the paternity issue.

It is, however, respectfully submitted that the *Urquhart* case, upon which petitioner predicates his argument herein, as is apparent from the foregoing discussion, is no longer controlling and the New York courts, in following the rationale of *Johnson* v. *Muelberger, supra,* have specifically held that cases concerning collateral attacks which were decided in New York prior to the 1951 *Johnson* ruling by this Court are no longer of any effect. For example, in

Orkin v. *Orkin*, 181 N.Y.S. 2d 272, the court stated as follows:

> "The cases cited by plaintiff predated *Johnson* v. *Muelberger*, supra, and are thus inappropriate."

It is apparent from a close reading of all decisions in *Urquhart* that, if the issues had been before the courts after the *Johnson* v. *Muelberger* decision was handed down, assuming a collateral attack could not have been made in Arkansas, the courts would not have permitted plaintiff therein to have given evidence concerning his paternity as a necessary preliminary step to a determination of the principal issue of validity of the defendants' divorce decree, since regardless of plaintiff's identity, such decree would have been unassailable.

C. Petitioner's contentions are without merit.

Petitioner refuses to accept the fact that *Johnson* v. *Muelberger, supra*, has overruled the rationale of *Urquhart* v. *Urquhart, supra*, and is completely dispositive of the Constitutional issues raised in this petition.

Accordingly, petitioner strains to find any ground upon which he can distinguish his case from the controlling concept of *Johnson* v. *Muelberger, supra*.

First, petitioner would challenge the applicability of *Johnson* v. *Muelberger, supra*, on the ground that there is a jurisdictional defect on the face of the record of the divorce proceedings before this Court, alleging that there is no evidence that the plaintiff in the divorce action complied with the statutory *resicende* requirement necessary to confer jurisdiction. Such a challenge, however, must necessarily fail, since the first paragraph in the divorce petition states that the plaintiff in the Georgia action was "a resident of Richmond County, Georgia for more than six months prior to the filing of this petition" (R. 37). Petitioner, however, develops the wholly novel theory,

entirely unsupported by statute or case law, that such unequivocal evidence of the basis of the court's jurisdiction is unacceptable because it was not *repeated* elsewhere in the record or stated in a different form.

The fatal defect of such an attack is obvious. There is no requirement under Georgia law that the statement concerning residence, which forms the basis of the court's jurisdiction, must be set forth in any other or different form than that used in the Georgia record now under scrutiny.

Petitioner also would label as "defective" the Georgia Superior Court Record furnished by respondent in these proceedings on the ground that it was "not exemplified or certified in accordance with United States Code Title 28, Section 1738" (petitioner's brief, p. 16).

The record of such proceedings supplied by respondent in support of his motion to dismiss the complaint was certified but not exemplified. However, no objection was raised by petitioner to the form of the record as submitted at the time the motion was made in the Supreme Court, nor at the time the appeal was perfected to the Appellate Division. The first time petitioner raised any issue concerning the condition of the record was in his brief to the Court of Appeals, at which time an exemplified copy of such divorce record was submitted by respondent.

It is respectfully submitted that petitioner is effectively precluded on this petition for a writ of certiorari from raising any question with respect to the exemplification or certification of the Georgia divorce record, as his failure to have done so prior to the perfecting of his appeal to the Court of Appeals of the State of New York, amounts to a waiver. Such a question of waiver was discussed in *Henry* v. *State of Mississippi*, 381 U. S. 908, in which the court held that any deliberate choice by defense counsel to delay opposition to tainted evidence or to discredit the witness offering the evidence or to invite error amounts

to a waiver binding on the defendant and precludes him from decision on the merits with respect to admission of such tainted evidence on appeal to this Court. Therefore, this Court should disregard petitioner's allegations in that respect.

Next, petitioner contends that Georgia law would permit a collateral attack upon the divorce decree of his putative parents but here again such a contention is futile in view of the applicable provisions of Georgia law.

In *Phillips* v. *Phillips*, 180 N.Y.S. 2d 475 (1958), the court considered particular questions of what, under Georgia law, constituted defects upon the face of the record. The court discussed *Jones* v. *Smith*, 120 Ga. 642, 48 S. E. 134, where it was contended that administrators of a decedent's estate had not been validly appointed because it did not affirmatively appear on the record that they were residents of Georgia. The fact of the matter was that the administrators were not residents of Georgia, but were residents of New York State as was proved by evidence outside the record, but the Georgia court held that inasmuch as the record did not "distinctly show" that the decedent was a non-resident, the presumption that all the jurisdictional requirements had been met was not rebutted. The court said:

> "[I]t is not essential that all the facts necessary to give jurisdiction shall appear on the face of the record. Where the record is silent, the presumption is that all necessary jurisdictional facts appeared, and no collateral attack can be made upon the judgment. . . . The record does not distinctly show that Lamar (the decedent) was a non-resident. In fact, the statements in the record are equivocal. . . . The presumption being in favor of the validity of the judgment, this ambiguity will be relieved by a construction which makes him a resident of this state at the time of his death. Such being the case, the judgment appointing the Joneses

> [the administrators] was not void. . . . The judgment appointing the Joneses administrators of the estate of Lamar being regular upon its face, it can not be collaterally attacked." 180 N.Y.S. 2d at p. 486

Thus, we have a Georgia holding that even where the record is silent, the presumption is that there was compliance with all necessary jurisdictional facts.

In the instant case, however, the record is not silent, nor is there any ambiguity. On the contrary, it affirmatively appears in the record, both in Mrs. Goldsmith's petition and in the court's decree, that Mrs. Goldsmith was a resident of Richmond County, Georgia, and had been so for more than six months prior to the filing of the petition and that the court had jurisdiction of the parties.

Furthermore, the burden is on the petitioner to establish that there is a defect on the face of the record and he has not sustained that burden by establishing that the evidence as to the court's jurisdiction is defective under Georgia law. In *Phillips*, the court said:

> "The burden should be placed upon one who would assail the decree of a sister state to prove that, under the laws of that state, he would be permitted to attack the decree. That view, I think, is more in keeping with the command of the Constitution; and it finds itself support in the language of the opinions—albeit not in the definitive decisions—of the United States Supreme Court. For example, in *Cook* v. *Cook*, 342 U. S. 126, 128, 72 Sup. Ct. 157, 159, 96 L. Ed. 146, supra, the court stated that the burden of undermining the decree of a sister state 'rests heavily upon the assailant', quoting from *Williams* v. *State of North Carolina* . . ." 180 N.Y.S. 2d at 485

Another Georgia case in point is *McLeod* v. *McLeod*, 144 Ga. 359, 87 S. E. 286 (1915), in which a wife obtained

a divorce from her husband as a result of service of process made upon him while he was in the penitentiary. After leaving the penitentiary, the husband remarried and later died, leaving his first and second wives surviving. The son of the first wife applied for letters of administration, as did the second wife. The son then contended that the divorce proceedings were a nullity because service on the decedent was improper. The court held that the service on the decedent was valid, because his residence would be considered that of the wife, where he lived before his conviction and sentence to the penitentiary and held that the decedent

> "made no objection to the service, and never attacked the verdicts during his lifetime. Under these facts, the divorce will not be declared void at the instance of his son by his first wife, on a collateral attack in a contest over the granting of letters on his estate. . . ." 87 S. E. at 287

E. Smythe Gambrell, Esq. has rendered an opinion, herein, amply bolstered by numerous Georgia authorities, that there is no jurisdictional defect on the face of this record and that no collaterial attack would be permitted in Georgia (54-63; 98-105), Mr. Gambrell analyzing this record in his affidavits, and concluding as follows:

> "It is my opinion, that based upon the facts set forth above in paragraph 2, and based upon the statutes and decisions set forth in paragraph 3, that where a petition for divorce shows upon its face that the court in which it is filed has jurisdiction of the persons, and where the defendant in such divorce action acknowledges service and acknowledges jurisdiction of the court, and where a court in its decree makes a finding that it has jurisdiction of the parties, there is no defect appearing upon the face of the record; it is further my opinion that where no defect appears upon

the face of the record such a divorce decree may not be collaterally attacked in Georgia . . . I have read the affidavit of Jackson Cook, Esq., submitted in this action. The facts upon which Mr. Cook has based his opinion are not as set forth in this affidavit, this [Mr. Gambrell's] affidavit being based upon the record only and not considering any matters not appearing of record in the Georgia action in the Supreme Court of Richmond County, Georgia." (R. 62-63)

Thus, we have the opinion of one of the leading attorneys in Georgia that the record in the divorce proceedings contains no defect on its face, and that, accordingly, it cannot be attacked collaterally in Georgia.

Further, petitioner would have this Court take the position that the question of jurisdiction must be litigated, in order to prevent a challenge. That contention has no merit.

In *Sherrer* v. *Sherrer,* 68 S. Ct. 1087, 334 U. S. 343, 92 L. Ed. 1429 (1948), the facts were highly similar to those in the *Goldsmith* divorce proceeding and this Court held that if the defendant appeared in the divorce action, there was full opportunity to litigate the question of jurisdiction, and the rendering state's divorce decree was entitled to full faith and credit under the Federal Constitution, not only as to the merits, but also as to the question of jurisdiction.

The significance of the Constitutional principle seems to have escaped petitioner for he would challenge the Georgia court's decree on the ground that the question of the court's jurisdiction over the subject matter may not have been specifically reviewed and determined in the Georgia proceeding. The attention of the Court in this respect is directed to David D. Siegel's "Commentary on the Domestic Relations Law", McKinney's Consolidated Laws of New York, 1964, in which at pages 38 and 39 the *Williams II* and *Sherrer* case are discussed, with particular reference to the problem of full faith and credit as to jurisdic-

tional matters. In the portion of the Commentary excerpted herein, "State A" refers to the state rendering the divorce decree and "State B" to the state in which collateral attack was attempted. Mr. Siegel says, among other things, at pages 38 and 39:

> "*Sherrer* thus holds that when the defendant merely appears in State A's action, the resulting judgment is not only Full Faith and Creditable of the merits, but of the court's jurisdiction as well, found even without actual contest. 'It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile.' *Williams II was* distinguished because in *Sherrer* 'the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated.' 'It is one thing', continued the Court in *Sherrer*, 'to permit relitigation of jurisdiction where the decree was issued 'in *ex parte* proceedings' but 'quite another' to do so where the decree followed an action 'in which the defendant has participated.' To the extent that anything in the *Andrews* case (*supra*) be deemed contrary to what *Sherrer* held, and *Andrews* indeed had indications to the contrary, it was in effect overruled by *Sherrer*, and the Court there said as much.
>
> "Another matter of moment appears to have been solved by the *Sherrer* case. Is this jurisdiction which State A has, or in any event which the defendant is held to concede by appearing and failing to contest it, 'jurisdiction of the person or of the subject matter'? The *Sherrer* case groups the two of them together (the quoted phrase is from the context in which *Sherrer* used it) and treats them alike. Hence, whatever distinctions might otherwise be made between the two categories of jurisdiction for other purposes (see 37 St. John's L. Rev. 379-385), they are not to be distinguished here, Emerging as res judicata from the

bilateral State A judgment, and falling within the mandate of Full Faith and Credit, are findings of *both* personal *and* subject matter jurisdiction.

* * * *

"Assume that P goes to State A, stays for unquestionably *less* than the residence period required by State A's law, brings the action, and D appears by attorney (not physically) in State A. On perjured testimony of residence, P gets his divorce from State A. Later the question of its validity arises in New York. Both parties *admit* the fraud and perjury on which State A's judgment rests. May New York in such instance deny recognition to the State A decree if it is shown that State A would itself *not* allow the judgment to be impeached in such instance? New York has answered No to that question (the facts are those of the *Boxer* case, *supra*), holding itself bound under Full Faith and Credit to give State A's judgment as much Faith and Credit as State A would. Ergo, no collateral attack was allowed."

Petitioner distinguishes *Sherrer* and *Coe, supra,* on the basis that both cases involved attacks made by parties to the original divorce proceeding and would permit an attack by an innocent third-party, such as a child.

Of course, that question has been answered definitively for all time and for all purposes by this Court in *Johnson* v. *Muelberger, supra,* a fact which petitioner seems constitutionally unable to digest.

Petitioner makes a feeble attempt also to distinguish the case at bar from a long line of authority precluding attacks on the theory that the majority of cases in which such attacks were barred related to estate matters, involving property rights. Unfortunately, however, for the petitioner the Constitutional principle enunciated in *Johnson* v. *Muelberger, supra,* is not limited to any category of

claims nor to the identity of the claimant. It is all-inclusive in its application.

Petitioner would also align himself, for the first time with wives who are protected by the "divisible divorce theory" alleging in his petition, that he only "seeks adjudication that the foreign decree is void *as to him*, stating as follows in his petition:

> "As a matter of fact since petitioner asks that the Georgia decree be declared void only as between himself and his parents but not as between themselves the situation is no different under full faith requirement than that of *Estin*."

Further, in effort to divorce himself from the operation of *Johnson* v. *Muelberger*, petitioner attempts to persuade this Court that he is not seeking to attack the validity of the divorce decree insofar as it adjudicates the marital status of respondent. However, an examination of his complaint (R. 10-15), belies that statement, pertinent provisions reading as follows:

> "4. There is no judgment or decree entered in any court of competent jurisdiction rendered in favor of or against either defendant herein dissolving their marriage.
>
> • • •
>
> "12. Said purported decree or judgment, which is void, and of no force or effect, is subject to impeachment by plaintiff as a nullity and without force or effect under the law of the rendering state, Georgia.
>
> • • •
>
> "15. Unduly to delay determination of plaintiff's status, *of defendants' relationship to each other* and of the invalidity of said pretended decree of total divorce will cause plaintiff undue hardship, expense and incalculable harm, *as well as resultant confusion as to the status and rights of* himself and *defendants*."

And in his prayer for relief:

> "1. That a declaratory judgment be rendered that the aforesaid colorable decree or judgment of said Superior Court of the State of Georgia is and was, when procured, void, invalid and of no force or effect."

It is, therefore, beyond cavil that the effect of a declaratory judgment which would strike down the valid Georgia decree of divorce is by no means limited to petitioner. Indeed, in the amended answer served herein by petitioner's mother, Florence D. Goldsmith, co-defendant with petitioner, she specifically prays in such amended answer for a declaratory judgment decreeing the Georgia decree of divorce obtained by her in 1952 in a divorce action instituted by her in Georgia to be void, invalid and of no force or effect. Her prayer for relief in such amended answer reading as follows:

> "WHEREFORE, the defendant herein joins with the plaintiff herein for judgment as prayed for by plaintiff in his complaint with the same force and effect as if said prayer for relief were fully and completely set forth in this AMENDED ANSWER." (R. 18)

It is respectfully submitted, therefore, that there is no merit whatsoever to petitioner's attempt, made for the first time in the instant petition to bring himself within the operation, by extension of the "divisible divorce concept." Struggling to find a Constitutional basis upon which to predicate an attack which has been explicitly forbidden by this Court, petitioner would disregard the precise language of his complaint and his mother's answer and have this Court find that if he is successful in his attack upon the Georgia divorce decree, it could be declared void "only as between himself and his parents, but not as between themselves" (Petitioner's Brief, p. 18).

Such a contention is so obviously frivolous that there is no need for consideration of the question by this Court.

Petitioner further argues that his Constitutional rights have been impinged upon because New York has given the Georgia decree greater effect than would be given in the rendering state.

That contention lacks merit and the cases cited by petitioner in support thereof are completely inapposite.

For example, petitioner cites *Dicks* v. *Dicks,* 177 Ga. 379, as his authority for contending that the court below erred in holding that there was no requirement under Georgia law that the petitioner's residence be pleaded or established in any particular form.

Clearly, Dicks v. *Dicks, supra,* is of no help to petitioner since that was a contested divorce and did not involve a collateral attack. The *Dicks* case was an appeal to the Supreme Court of Georgia from the trial court's decree granting the divorce. The question of the plaintiff's domicile was actually contested at the trial by the defendant but was decided in favor of the plaintiff. The plaintiff was a soldier residing on a Government reservation, both the petition and the testimony at trial holding that the plaintiff was stationed at Fort Benning. On appeal the court held that a solder on a Government reservation could not acquire a residence in Georgia sufficient to give the court jurisdiction to grant a divorce. Therefore, the *Dicks* case is certainly no authority for permitting a collateral attack on a divorce decree, for no collateral attack was involved.

Further, petitioner relies on *Cole* v. *Cole,* 221 Ga. 171 (1965), as authority for the proposition that, "Full Faith and Credit is not accorded by the courts in Georgia to a sister state decree of divorce where evidence dehors the divorce case record shows that such foreign decree is a nullity for want of jurisdiction". In the *Cole* case, *supra,* the courts of Georgia, called upon to determine whether a collateral attack could be launched in that state against an Alabama decree, applied the law of the rendering state,

finding that since Alabama would permit such a collateral attack, under sound Constitutional principles which the Appellate Division firmly had in mind in the case at bar, permitted the attack in Georgia. Obviously, there is not the remotest connection between that case and the issue at bar.

Petitioner also seeks comfort from the provisions of the Georgia code with reference to *void* domestic judgments. Again, this argument is irrelevant since the challenged judgment is not void on its face.

Also, petitioner attempts to negate the authority of other Georgia decisions on the ground that they were interspousal suits in equity and involved no right of collateral attack by children. This argument, of course, is still further evidence of the fact that petitioner does not understand the rationale of the *Johnson* v. *Muelberger* case, which extended the disability of the original parties to all would-be assailants.

Furthermore, petitioner would at times deny that he seeks any benefit from the declaratory relief sought by him. For example, in his petition (p. 21), he states:

> "Positively, petitioner claims no benefit from the purported divorce decree;"

Again, to the same effect, he states at page 17 of his petition in an effort to distinguish his case from *Johnson* v. *Muelberger, supra:*

> "But no property rights as such were involved in *May* or in the case at bar."

Sharply conflicting, however, with such disavowal of any monetary interest or property right, petitioner quarrels with the courts below, stating they have not "acted for the protection of the property interests" of the child (p. 25).

It is significant in this connection, of course, that prior to instituting this action, petitioner had exhausted all available remedies over the past 13 years to obtain support from respondent, having been unsuccessful in steps taken by him in the Family Court of the State of New York for that purpose.

Equally unpersuasive is the argument advanced by petitioner in Point II, page 20, of the petition to the effect that the denial of an opportunity to have his status as a "legitimate citizen" determined is unconstitutional. In the first place, as stated above, the optimum of his proof could only establish his illegitimacy in view of the Constitutional prohibition against the attack of the putative parents' divorce decree. Further, this Court has established in prior decisions that each State has the power to regulate the status of its citizens and an unwelcome result of the application of such a statute is not ground for invoking Constitutional protection if the statute or case law itself is not unconstitutional. Hence, the refusal, by the Courts of New York to permit the determination of paternity in a Supreme Court action is no grounds for invoking the jurisdiction of this Court.

Finally, hard pressed for a legal argument petitioner launches into a detailed discussion (petition, pp. 23-26) of abstract morals and sociological problems of the last century, concluding that he is entitled to be rescued from the undesirable effects of bastardy by an enlightened social conscience which has put an end to slavery and to segregated education.

CONCLUSION

It is respectfully submitted that the petitioner's petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

GERALD I. LUSTIG,
Attorney for Respondent.

APPENDIX A

Judgment.

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK.

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Plaintiff,

against,

STUART M. GOLDSMITH, and FLORENCE D. GOLDSMITH,

Defendants.

An appeal having been taken to the Appellate Division, First Department, by defendant Stuart M. Goldsmith, from an order of this Court, entered on the 30th day of March, 1965, denying defendant Stuart M. Goldsmith's motion to dismiss the complaint, and said appeal having been argued by Gerald I. Lustig, Esq., of counsel for defendant Stuart M. Goldsmith, and by Clifton F. Weidlich, Esq., of counsel for the respondent; and due deliberation having been had thereon, the Appellate Division, First Deparement, by order filed the 15th day of February, 1966, reversed the order appealed from with $50.00 costs and disbursements to defendant Stuart M. Goldsmith, and granted defendant Stuart M. Goldsmith's motion to dismiss the complaint and directed the Clerk to enter judgment in favor of defendant Stuart M. Goldsmith, dismissing the complaint with costs,

Now, on motion of Gerald I. Lustig, Esq., of counsel for defendant Stuart M. Goldsmith, it is

ADJUDGED, that the complaint be dismissed, and it is further

ADJUDGED, that defendant Stuart M. Goldsmith, residing at 18 East 68th Street, New York, New York, recover of Edward S. Blackstone, Guardian ad Litem for Patrick D. Goldsmith, plaintiff herein, $1,035.44 costs and disbursements, and that defendant Stuart M. Goldsmith have execution therefor.

Judgment signed and entered the 25th day of July, 1967.

JAMES McGUIRRIN,
Clerk.

APPENDIX B

Statutes Involved.

United States Constitution, Article IV:

"Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Record, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution, Amendment XIV:

"§ 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 United States Code, Section 1738:

"The records and judicial proceedings of any court of any such State . . ., or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

Appendix B

28 United States Code, Section 1257(3):

"§ 1257. *State courts; appeal; certiorari*

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • • •

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

New York Civil Practice Law and Rules:

"3211(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more caues of action asserted against him on ground that:

"1. a defense is founded upon documentary evidence; or

"7. the pleading fails to state a cause of action."

New York Family Court Act, Article V:

"§ 517. *Time for instituting proceedings*

"(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support."

Appendix B

Code of Georgia, 1933, as amended:

SECTION 81-503—"If a defendant shall appear and plead to the merits, without pleading to the jurisdiction, and without excepting thereto, he shall thereby admit the jurisdiction of the court."

SECTION 110-701—"A void judgment may be attacked in any court and by any person. In all other cases judgments may not be impeached collaterally, but must be set aside by the court rendering them."

SECTION 110-702—"When a judgment has been rendered, either party may move in arrest thereon, or to set it aside for any defect not amenable which appears on the face of the record or pleadings."

SECTION 110-706—"Any judgment, verdict, rule or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury; and it shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury, the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually vacated and set aside."

Appendix B

SECTION 110-708—"The judgment of a court of competent jurisdiction may not be collaterally attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside."

SECTION 110-709—"The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it."

SECTION 3-702—"All proceedings of every kind in any court of this State to set aside judgments or decrees of the courts, shall be made within three years from the rendering of said judgments or decrees."

SECTION 30-107—"No court shall grant a divorce of any character to any person who has not been a bona fide resident of the State six months before the filing of the application for divorce."

SECTION 37-813—". . . equity will grant relief as between the original parties [to a judgment] or their privies in law, in fact, or in estate."

SUPREME COURT, U. S.

SEP 1 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 422

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian *ad Litem*,

Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

REPLY BRIEF OF PETITIONER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

CLIFTON F. WEIDLICH,
Attorney for Petitioner,
55 Liberty Street,
New York, N. Y. (10005).

TABLE OF CASES

	PAGE
Dicks v. Dicks, 177 Ga. 379 (1933)	2
Bellamy v. Bellamy, 187 Ga. 56, 58 (1938)	2
Owens v. Owens, 189 Ga. 338 (1939)	2
Phillips v. Phillips, 211 Ga. 305, 85 S. E. 2d 427 (1955)	4
Thomas v. Lambert, 187 Ga. 616, 1 S. E. 2nd 443 ...	4

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Respondent has misread the opinion of the Supreme Court of Georgia in *Cole* v. *Cole*, 221 Ga. 171, 143 S. E. 2nd 667, decided on July 12, 1965. The court plainly held that a divorce decree, obtained in Alabama by the parties' false representations of their residence in the sister state, is a nullity and may be collaterally attacked in any court of Georgia by a non-party to the purported decree who is materially and adversely affected by such decree.

Respondent incorrectly states at pages 37-38 of his brief that the Georgia Superior and Supreme Courts "applied the law of the rendering state, finding that since Alabama would permit such a collateral attack", the courts of Georgia permitted attack. On the contrary the *Cole* case contains no finding that collateral attack would be allowed in Alabama. The evidence of Mrs. Cole conclusively showed

in her Georgia divorce action that "a fraud was practiced by her and her former husband on the Alabama court which purportedly divorced them." Such decree, being a nullity, was subject under Georgia law to collateral attack by one not a party to such foreign divorce.

Divorce applicants must plead and prove *bona fide* residence in Georgia for the prescribed period, now six months.

> *Dicks* v. *Dicks,* 177 Ga. 379 (1933);
> *Bellamy* v. *Bellamy,* 187 Ga. 56, 58 (1938);
> *Owens* v. *Owens,* 189 Ga. 338 (1939).

In *Bellamy* the Supreme Court of Georgia held that parties to a divorce suit, in which defendant was a non-resident, could not waive jurisdiction by plea or otherwise

> "So as to dispense with proof in the court"

of plaintiff's *bona fide* residence.

While respondent makes no claim of any offer of proof of Mrs. Goldsmith's "residence" in Augusta, he has the temerity to assert that her petition for divorce falsely *alleges* six months residence in Georgia.

The divorce petitioner verified only the *numbered* paragraphs of her petition. No such paragraph referred to her residence anywhere. Addressed to the Superior Court of Richmond County, the divorce petition contains no caption or title. Preceding the body of the petition containing five *numbered* and sworn allegations is the following unsworn and untrue preamble:

> "This petition of Florence A. Goldsmith * * * as resident of Richmond County, Georgia, for more than six months prior to the filing of this petition against Stuart M. Goldsmith, as Defendant, respectfully shows:"

Mr. Jackson Cook, an attorney in active practice in Atlanta, Georgia, gave the following opinion as to the lack of evidence or proof of the essential jurisdictional fact of residence in the Georgia divorce court record:

> "My opinion has been requested as to whether a decree of divorce granted by a Georgia court may be collaterally attacked in Georgia under the following state of facts:
>
> On April 24, 1952, Mrs. Florence D. Goldsmith journeyed to Georgia for the purpose of conferring with her attorney in regard to obtaining a total divorce from her husband, Stuart M. Goldsmith. Mrs. Goldsmith was at the time a resident of New York, New York, and had not previously nor has she ever been a resident of Georgia. Mrs. Goldsmith remained in Georgia part of one day and thereafter returned to New York. A petition seeking a decree of total divorce was filed with the Superior Court of Richmond County, Georgia, wherein Mrs. Goldsmith alleged in the preamble to said petition that she had been a resident of Richmond County, Georgia, for 'more than six months prior to the filing' of said petition. In addition to the preamble which recited the allegation of residence, there were five consecutively numbered paragraphs. Only the consecutively numbered paragraphs were sworn to by the plaintiff, Mrs. Goldsmith. At no point in the petition did Mrs. Goldsmith swear to the fact of residence nor does the record of proceedings disclose any evidence as to her residence. A decree of total divorce was granted to Mrs. Goldsmith on May 27th, 1952, with the only evidence being Mrs. Goldsmith's deposition in which her residence was not mentioned.
>
> I have researched the law of Georgia as it relates to collateral attack upon a decree of divorce under the foregoing state of facts, and it is my opinion that a decree wherein the record discloses no proof of an essential jurisdictional fact is void on its face and thus is subject to attack 'in any court. . . . by any person' whose rights are affected

under the provisions of Ga. Code Section 110-701 (1933)."

Phillips v. *Phillips*, 211 Ga. 305, 85 S. E. 2d 427 (1955),

cited by respondent in his brief (p. 20), is not in point. There the infant plaintiff, a third party to the divorce decree, was not allowed to attack the decree directly under Georgia Code section 37-813. That section provides that equity will grant relief as between the original parties or their privies in estate. In that case plaintiff's father was deceased. The case has no bearing upon the Georgia law of collateral attack.

Thomas v. *Lambert*, 187 Ga. 616, 1 S. E. 2nd 443,

is equally beside the mark. In a headnote opinion the court said:

> "A domestic judgment cannot be attacked as void, unless its invalidity appears on the face of the record. * * *
>
> The decree in the previous divorce suit is not void on the face of the record, since the petition in that case contained the positive averment of the residence of the defendant in the county where the divorce suit was filed. . . ."

On the other hand in the case at bar, there is not only no "positive averment" of the divorce petitioner's residence, but the entire record of the divorce reveals, as to the essential jurisdictional residence in Georgia, no pleading, admission, evidence or finding thereof.

Respectfully submitted,

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